133-655

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 191.

MORTON CULVER AND MICHAEL GORMLEY, PLAINTIFFS IN ERROR,

vs.

GERTRUDE UTHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 16, 1886.

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a UNITED STATES OF AMERICA, } ss:
State of Illinois, }

To Gertrude Uthe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to an allowance of a writ of error by the chief justice of the supreme court of Illinois and entered of record in the clerk's office of the supreme court of Illinois on the 10th day of September, A. D. 1886, wherein Morton Culver and Michael Gormley are plaintiffs in error and Gertrude Uthe is defendant in error, to show cause, if any there be, why the errors complained of by plaintiffs in error and in their petition mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. John M. Scott, chief justice of the supreme court of Illinois, this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-six (1886).

JOHN M. SCOTT, [SEAL.]
Chief Justice.

b [Endorsed:] Supreme Court of the United States. Morton Culver and Michael Gormley *vs.* Gertrude Uthe. Citation to October term, A. D. 1886.

I hereby accept service of the within writ for defendant in error and enter her appearance to the October term, 1886, of said Supreme Court.

Oct. 5, 1886.

HENRY BOOTH,
Att'y for Gertrude Uthe, Def't in Error.

WILLIAM H. CONDON &
BOOTH & BOOTH,
Of Counsel.

c At a supreme court, begun and held at Ottawa, on Tuesday, the first day of September, in the year of our Lord one thousand eight hundred and eighty-five, within and for the northern grand division of the State of Illinois.

Present: The Honorable John H. Mulkey, chief justice; John M. Scott, justice; John Scholfield, justice; Simon P. Shope, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice.

Be it remembered, to wit, on the 19th day of August, A. D. 1885, the same being in vacation, before the term of court aforesaid, there was filed in the office of the clerk of said court a certain præcipe in words and figures following, viz:

In the Supreme Court of Illinois, Northern Grand Division.

MICHAEL GORMLEY and MORTON CULVER *vs.* GERTRUDE UTHE. } Writ of Error to Appellate Court, First District.

The clerk will please—
(1.) Docket above-entitled cause.
(2.) Issue writ of error to appellate court, 1st district.
(3.) Issue summons to Gertrude Uthe, defendant in error, directed to sheriff of Cook county for service.

MORTON CULVER,
Att'y for Pl'nt'ffs in Error.

Whereupon, on the 19th day of August, A. D. 1885, there issued out of said clerk's office a certain writ of error in words and figures following, viz:

d STATE OF ILLINOIS, } *ss:*
Supreme Court, Northern Grand Division,

The People of the State of Illinois to the clerk of the appellate court of Illinois, first district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the appellate court of Illinois, first district, before the judges thereof, between Michael Gormley and Morton Culver and Gertrude Uthe, it is said manifest error hath intervened, to the injury of the aforesaid Michael Gormley and Morton Culver, as we are informed by their complaint, and we, being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that, if judgment thereof be given, you, distinctly and openly, without delay, send to our justices of the supreme court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid, at Ottawa, in the county of La Salle, on the first Tuesday of September next, that, the record and proceedings being inspected, we may cause to be done therein to correct the error what of right ought to be done according to law.

Witness the Hon. John Scholfield, chief justice of our [SEAL.] court, and the seal thereof, at Ottawa, this 19th day of August, in the year of our Lord one thousand eight hundred and eighty-five.

A. H. TAYLOR,
Clerk of the Supreme Court.

e And, to wit, on the 19th day of August, A. D. 1885, there issued out of said clerk's office a certain *scire facias* in words, and figures following, viz:

STATE OF ILLINOIS,
Supreme Court, Northern Grand Division, } ss:

The People of the State of Illinois to the sheriff of Cook county, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which was in the appellate court of Illinois, first district, before the judges thereof, between Michael Gormley and Morton Culver and Gertrude Uthe, it is said manifest error hath intervened, to the injury of the said Michael Gormley and Morton Culver, as we are informed by their complaint, the record and proceedings of which said judgment we have caused to be brought into our supreme court of the State of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same in due form and manner, according to law:

Therefore we command you that, by good and lawful men of your county, you give notice to the said Gertrude Uthe that she be and appear before the justices of our said supreme court at the next term of said court to be holden at Ottawa, in said State, on the first Tuesday in September, A. D. 1885, to hear the record and proceedings aforesaid and the errors assigned, if she shall see fit; and, further, to do and receive what said court shall order in this behalf, and have you then and there the names of those by whom you shall give the said Gertrude Uthe notice, together with this writ.

[COURT SEAL.] Witness John H. Mulkey, chief justice of our said court, and the seal thereof, at Ottawa, this 19th day of August, in the year of our Lord one thousand eight hundred and eighty-five.

A. H. TAYLOR,
Clerk of the Supreme Court.

f Which said writ was afterwards, to wit, on the 25th day of September, 1885, returned into said clerk's office, endorsed as follows, viz:

Pd. 10.
The within-named defendant not found in my county this 1st day of September, 1885.

SETH F. HANCHETT, *Sheriff,*
By T. LEIBRANDT, *Deputy.*

Be it remembered that afterwards, to wit, on the 2nd day of September, A. D. 1885, as return to said writ of error, there was filed in the office of the clerk of the said supreme court a certain transcript of the record and proceedings of the superior court of Cook county, together with a transcript of the record and proceedings of the said appellate court of Illinois, first district; which said transcripts are in the words and figures following, viz:

1 STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Kirk Hawes, one of the judges of the superior court of Cook county, at a term of the circuit court of said Cook county, begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of November, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

Present: Honorable Kirk Hawes, one of the judges of the superior court of Cook county, State of Illinois, presiding and holding this term of the court, by request of the judges of said circuit court, as a branch court, in pursuance of the statute in such case made and provided; L. L. Mills, State's attorney; Seth F. Hanchett, sheriff.

Be it remembered that heretofore, to wit, on the 2nd day of August, A. D. 1878, Gertrude Uthe, by Wm. H. Condon, Esq'r, her attorney, filed in said court her certain declaration and caused to be issued, out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said declaration and writ, together with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In Circuit Court of Cook County, to the August Term, A. D. 1878.

2 GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } Assumpsit.

Gertrude Uthe, by Wm. H. Condon, her attorney, complains of Morton Culver and Michael Gormley, defendants, of a plea of trespass on the case on promises.

For that whereas the defendants, on March the twenty-third (23), eighteen hundred and seventy-four (1874), in the city of Chicago, county of Cook, made their eleven (11) promissory notes, the date whereof is the day and year aforesaid, by one of which said promissory notes the defendants four years after date promised to pay to the order of the plaintiff fourteen hundred dollars for value received, with interest thereon at the rate of eight per centum per annum after the same should become due; and by another of said promissory notes the defendants two years after date promised to pay to the order of the plaintiff one hundred and twelve dollars for value received, with interest thereon at the rate of ten per centum per annum after the same should become due; and by another of the said promissory notes the defendants three years after date promised to pay to the order of the plaintiff one hundred and twelve dollars for value received, with interest thereon at the rate of ten per centum

per annum after the said note should become due; and by another of the said promissory notes the defendants four years after date promised to pay to the order of the plaintiff one hundred and twelve dollars for value received, with interest thereon at the rate of ten per centum per annum after said note should become due; and by another of the said promissory notes the defendants four years after date promised to pay to the order of the plaintiff fourteen hundred dollars, for value received, with interest thereon at the rate of eight per centum per annum after the same should become due; and by another of said promissory notes the de-
3 fendants three years after date promised to pay to the order of the plaintiff one hundred and twelve dollars for value received, with interest thereon at the rate of ten per centum per annum after the said note should become due; and by another of the said promissory notes the defendants four years after date promised to pay to the order of the plaintiff one hundred and twelve dollars for value received, with interest at the rate of ten per centum per annum after the said note should become due; and by another of the said promissory notes the defendants four years after date promised to pay to the order of the plaintiff fourteen hundred sixty-one dollars and sixty-seven cents for value received, with interest thereon at the rate of eight per centum per annum after the said note should become due; and by another of the said promissory notes the defendants two years after date promised to pay to the order of the plaintiff one hundred and sixteen dollars and ninety-three cents for value received, with interest thereon at the rate of ten per centum per annum after the said note should become due; and — another of the said promissory notes the defendants three years after date promised to pay to the order of the plaintiff one hundred sixteen dollars and ninety-three cents for value received, with interest thereon at the rate of ten per centum per annum after the same should become due; and by another of the said promissory notes the defendants promised four years after date to pay to the order of the plaintiff one hundred sixteen dollars and ninety-three cents for value received, with interest thereon at the rate of ten per centum per annum after the same should become due.

And whereas the said defendants afterwards, to wit, on the first (1) day of August, in the year of our Lord one thousand eight hundred and seventy-eight, at Chicago, Cook county, became and were indebted to the said plaintiff in the sum of seven thousand ($7,000.00) dollars of lawful money of the United States of America for
4 divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the defendants, and at the special instance and request of the said defendants, and being so indebted to the said plaintiff the said defendants in, consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, city of Chicago, county of Cook, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterward requested; and

whereas, also, the said defendants afterward, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants, at city of Chicago, county of Cook, then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of sale and delivery thereof, were reasonably worth, when the said defendants should be thereunto afterward requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of seven thousand ($7,000.00) dollars of like lawful money as aforesaid, to wit, at the place aforesaid; whereof the said defendants afterward, on the same day and year, and at the place aforesaid, had notice; and whereas, also, the said defendants afterward, to wit, on the same day and year, and at the same place aforesaid, city of Chicago, county of Cook, were indebted to the said plaintiff in the further sum of seven thousand ($7,000.00) dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of said defendants, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants and at the request of the said defendants; and in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the plaintiff for the defendants, and at the like special request of the defendants, and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the same place aforesaid, city of Chicago, county of Cook, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendants should be thereunto afterward requested; and whereas, also, the said defendants afterward, to wit, and [on] the same day and year and at the same place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of seven thousand ($7,000.00) dollars of the like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, *and* the said defendants, in consideration thereof, afterward, to wit, on the same

day and year, and at the same place aforesaid—city of Chicago, county of Cook—undertook and then and there faithfully
6 promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterward requested.

Yet, although the day of payment in the said notes specified has elapsed, the defendants have not paid to the plaintiff the amount of the said notes or any part thereof, but refuse so to do, nor have the defendants, though requested, paid to the plaintiff the several other sums of money above specified or any or either of them or any part thereof, but refuse to pay her the same, to the damage of the plaintiff of seven thousand dollars, and therefore she brings her suit, etc.

WM. H. CONDON,
Plaintiff's Attorney.

Copy of the Account Sued On.

$1,400.00. CHICAGO, *March* 23*d*, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred dollars, at Chicago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A, 1.

[On the margin:] This note is secured by trust deed of even date herewith.

$112. CHICAGO, *March* 23*rd*, 1874.

Two years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 2.

Indorsed: Gertrude Uthe.

7 $112. CHICAGO, *March* 23*rd*, 1874.

Three years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series No. 3.

Indorsed: Gertrude Uthe.

$112. CHICAGO, *March* 23*rd*, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 4, series A, No. 1.

$1,400. CHICAGO, *March* 23*rd*, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred dollars, at Chicago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A, 2.

[On margin:] This note is secured by trust deed of even date herewith.

$112. CHICAGO, *March* 23*rd*, 1874.

Three years, without grace, after date, for value received,
8 we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 3, series A, No. 1.

Indorsed: Gertrude Uthe.

$112. CHICAGO, *March* 23*rd*, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 4.

$1,461.67. CHICAGO, *March* 23*rd*, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred sixty-one $\frac{67}{100}$ dollars, at Chicago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A, — 3.

[On margin:] This note is secured by trust deed of even date herewith.

$116.93. CHICAGO, *March* 23*d*, 1874.

Two years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred sixteen and $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 3.

9 Indorsed: $58.93 paid on within note March 27, 1876. Gertrude Uthe.

$116.93. CHICAGO, *March* 23*rd*, 1874.

Three years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred sixteen and $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 3, series A, No. 3.

$116.93. CHICAGO, *March* 23, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred sixteen and $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 4, series A, No. 3.

Morton Culver and Michael Gormley to Gertrude Uthe, Dr.

To money lent and advanced	$7,000 00
To money paid, laid out, and expended	7,000 00
To money had and received to and for the use of said plaintiff	7,000 00
To goods, wares, and merchandise sold and delivered	7,000 00
To labor, services, and material	7,000 00
To balance due on account stated	7,000 00

Summons.

STATE OF ILLINOIS, } *ss*:
Cook County, }

10 The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Morton Culver and Michael Gormley, if they shall be found in your county, personally to be

and to appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said Cook county, on the third Monday of August instant, to answer unto Gertrude Uthe in a plea of trespass on the case upon promises to the damage of said plaintiff, as it is said, in the sum of seven thousand dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 2nd day of August, A. D. 1878.

[SEAL.] JACOB GROSS, *Clerk.*

Endorsed.

Served the within-named defendant, Michael Gormley, this 9th day of August, 1878, by reading the same to him; also served Morton Culver this 10th day of August, 1878, by reading the same to him.

CHARLES KERN, *Sheriff,*
By I. J. FITZGERALD, *Deputy.*

3.10 paid.

And thereupon, on the 10th day of September, A. D. 1878, there was filed in said cause a certain plea and notice of set-off and affidavit of merits, and [in] the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County. }

11 In the Circuit Court of Cook County, to the August Term, A. D. 1878.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY, Impleaded with MORTON CULVER. } Assumpsit.

And the defendant, Michael Gormley, comes and defends the wrongs and injury when, etc., and says that he did not undertake or promise in manner and form as the plaintiff has in her declaration thereof complained against him, and — this he puts himself upon the country.

MICHAEL GORMLEY, *Defendant.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

In the Circuit Court, Cook County, to the August Term, A. D. 1878.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY, Impleaded with MORTON CULVER. } Assumpsit.

Michael Gormley, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and that he verily

believes that he has a good defence to said suit upon the merits as to the whole of plaintiff's demand.

MICHAEL GORMLEY.

Subscribed and sworn to before me this 10th day of September, 1878.

JACOB GROSS, *Clerk.*

12 And for a further plea in this behalf this defendant says *actio non on*, because he says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed causes of action in the said first count mentioned on the eleven promissory notes therein described, and not different causes of action, and that the consideration upon which the said notes were made has wholly failed; and this defendant further says that at the time and before the making of said notes by this defendant and his codefendant, Morton Culver, to wit, on the 23rd day of March, 1874, the said Gertrude Uthe and one Mary Ann Martin then and there agreed with this defendant and said Culver to sell them at the price of $6,400, and to convey to them in fee simple by deed, with full covenants of warranty, a certain tract of land in Cook county, Illinois, known as the southeast ¼ of sec. 12, T. 42 N., R. 12 E., of 3rd P. M., of which sum, $6,400, the said plaintiff was to have ⅔ as her share and the said Martin ⅓, and thereupon the said Uthe and Martin, on the day aforesaid, then made and delivered to this defendant and the said Culver a deed purporting to be a deed of conveyance of said parcel of land in fee simple, which said deed, having date the day aforesaid, is now to the court here shown, and thereby covenanted with the defendant and the said Culver that they, the said Uthe and Martin, were then well seized of the said parcel of land as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and then had good right, full power, and lawful authority to grant, bargain, sell, and convey the same in fee simple as aforesaid, as by the said deed, reference being had thereto, will more fully appear; and thereupon this defendant and the said Culver, to secure the payment to the said Uthe, the payment of her ⅔ part of the said price, and upon the sole consideration of the sale and conveyance so

13 agreed and purported to be made of the said parcel of land as aforesaid and of the covenants in the said deed contained, then and there made and delivered the said notes to the said Uthe; and this defendant further says that at the time of the making and delivery of the said deed the said Uthe and the said Martin were not nor either of them well seized of the said parcel of land or of any portion thereof, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, nor had they or either of them then good right, full power, and lawful authority to grant, bargain, sell, and convey the same as aforesaid; but, on the contrary, the said Uthe and Martin or either of them did not then have any right or title whatever to the said parcel of land or any part thereof; and this defendant further says that upon

the discovery thereof and before the commencement of this suit he and his codefendant, the said Culver, offered to quitclaim and convey to the said Uthe a $\frac{2}{3}$ part of said land and demanded the delivery and surrender of said notes, which the said Uthe refused to do; and this defendant now here offers to quitclaim and convey such $\frac{2}{3}$ to said Uthe; wherefore this defendant has not had nor has the possession and title to such land or any parcel thereof, and this this defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have her aforesaid action against—

MICHAEL GORMLEY.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, of the August Term, A. D. 1878.

MICHAEL GORMLEY, Impleaded with MORTON CULVER, *ads.* GERTRUDE UTHE.

To said plaintiff:

14 Please take notice that this defendant, upon the trial of the above-entitled cause, will introduce in evidence and prove that on the first day of January, 1878, and before the commencement of said cause, the said plaintiff was and is now indebted to the said defendant and his codefendant in a large sum of money, to wit, in the sum of ten thousand dollars, for money before that time lent and advanced to said plaintiff by said defendant at said plaintiff's request; and also in the like sum for money before that time paid, laid out, and expended for said plaintiff by said defendant at the like special request of said plaintiff; and in the like sum for money before that time had and received by said plaintiff to and for the use of said defendant; and also in the like sum for goods, wares, and merchandise before that time sold and delivered by said defendant to said plaintiff at the like special instance and request; and also in the like sum for the labor, care, and diligence of said defendant before that time done and performed by said defendant for said plaintiff, and at the like instance and request of said plaintiff; and also in the like sum for other money before that time and then due and owing the said defendant for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said plaintiff to the said defendant; and also in the like sum then and there found to be due and owing from said plaintiff to said defendant on an account stated between them; and the said defendant will on such trial off set and allow the said several sums of money so due and owing from said plaintiff to said defendant against any sum the said plaintiff may claim and prove in this action to be due him, and will ask the court for a judgment for the balance, if any there be, due said defendant.

MICHAEL GORMLEY, *Defendant.*

15 *Copy of Account.*

Gertrude Uthe to Michael Gormley (impleaded with Morton Culver), Dr.

March 23d, 1875, to cash	$340 93
July 29, " "	10 60
March 27, 1876, "	170 93
To money lent and advanced	10,000 00
To money paid, laid out, and expended	10,000 00
To money had and received to and for the use of the plaintiff	10,000 00
Goods, wares, and merchandise sold and delivered	10,000 00
Labor, services, and material	10,000 00
Balance due on account stated	10,000 00

And thereupon, on the 16th day of December, A. D. 1879, the following proceedings were had and entered of record in said cause, to wit:

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29318, 1744. Assumpsit.

This day came the said plaintiff, by her attorney, and the defendant, Morton Culver, having been duly personally served with process of summons issued in said cause ten days at least before the return thereof, and he, being now three times solemnly called in open court, came not, but made default, which is, on motion, hereby taken and the same is hereby entered herein of record.

Wherefore it is considered that said plaintiff ought to recover of said defendant, Morton Culver, her damages by reason of the premises.

16 And thereupon, on the 7th day of January, A. D. 1880, there was filed in said cause a certain replication in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County, to the December Term, A. D. 1879.

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. }

And the said plaintiff, as to the plea of the said defendant, Michael Gormley, by him (first) above pleaded, and whereof he has put himself upon the country, doth the like.

WM. H. CONDON,
Pl'ff's Att'y.

And the said plaintiff, as to the said plea of the said defendant, Michael Gormley, by him (secondly) above pleaded, saith that the said plaintiff, by reason of anything by the said defendant, Michael Gormley, in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendants or either of them, because she saith that the consideration upon which said promissory notes were made has not wholly failed.

And the said plaintiff further saith that at the time of making and delivering to the said defendants the deed of the land set forth in said plea the said plaintiff, Gertrude Uthe, and Mary Ann Martin, and each of them, were well seized of the parcel of land described and set forth in said deed and every portion thereof as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and then has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in fee
17 simple and this she, the said plaintiff, prays may be inquired of by the country, etc.

WM. H. CONDON,
Pl'ff's Att'y.

And, thereupon, on the 29th day of January, A. D. 1880, there was filed in said cause a certain plea and affidavit of merits, and a certain replication and a certain order was made and entered of record, all of which is in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County, to the January Term, A. D. 1880.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY and MORTON CULVER. } Assumpsit.

And the said defendant, Morton Culver, in his own person, comes and defends the wrong and injury when, etc., and says that he did not undertake or promise in manner and form as the plaintiff has in her declaration thereof complained against him, and of this he puts himself upon the country.

MORTON CULVER, *Def't.*

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County, to the January Term, A. D. 1880.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY and MORTON CULVER. } Assumpsit.

18 Morton Culver, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and that

he verily believes he has a good defence to said suit upon the merits as — the whole of plaintiff's demand.

MORTON CULVER.

Subscribed and sworn to before me this 29th day of January, A. D. 1880.

SAM. R. HURFORD,
Notary Public.

[NOTARIAL SEAL.]

And for a second plea in this behalf the defendant, Morton Culver, says *actio non on*, because he says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit:

The supposed causes of action in the said first count mentioned on the eleven promissory notes therein described, and not different causes of action, and that the consideration upon which the said notes were made has wholly failed.

And this defendant further says that at the time and before the making of said notes by this defendant and his codefendant, Michael Gormley, to wit, on the 23rd day of March, 1874, the said plaintiff, Gertrude Uthe, and one Mary Ann Martin then and there agreed with this defendant and said Gormley to sell them at the price of $6,400 and to convey to them in fee simple by deed with full covenants of warranty a certain tract of land in Cook county, Illinois, known as the southeast quarter of section twelve, township 42 north, of range 12 east, of the third principal meridian, of which sum of $6,400 the said plaintiff was to have two-thirds as her share and the said Mary Ann Martin the remaining one-third thereof; and thereupon the said Uthe and Martin, on the day aforesaid, then made and delivered to the defendants a deed purporting to be a deed of conveyance of the said parcel of land in fee simple, which said deed, bearing date the day aforesaid, is now to the court here
19 shown and thereby covenanted with the defendants that they, the said Uthe and Martin, were then well seized of the said parcel of land as a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and then had good right, full power, and lawful authority to grant, bargain, sell, and convey the same in fee simple as aforesaid, as by the said deed, reference being had thereto, will more fully appear; and thereupon the defendants, to secure the payment to said plaintiff of her two-thirds share of said price and upon the sole consideration of the sale and conveyance as agreed and purported to be made of the said parcel of land as aforesaid and of the covenants in the said deed contained, then and there made and delivered the said notes to the plaintiff and secured the payment by three mortgages on the west one-half of and the southeast one-quarter of the southeast quarter of said section twelve, which were then and there accepted by plaintiff; and this defendant further says that at the time of the making and delivery of the said deed the said Uthe and Martin were not nor either of them well seized of the said parcel of land or any portion thereof as of a good, sure, perfect, absolute, and indefeasible estate of inher-

itance in the law in fee simple, nor had they or either of them then good right, full power, or lawful authority to grant, bargain, sell, and convey the same as aforesaid, but, on the contrary, the said Uthe and Martin or either of them did not then have any right or title whatsoever to the said parcel of land or to any part thereof.

And this defendant further says that, upon discovery thereof and before the commencement of this suit, the defendants offered to quitclaim and convey to the said Uthe a two-thirds part of said land and demanded the delivery and surrender of said notes, which the said Uthe refused to do; and this defendant with said Gormley now here offer to quitclaim and convey three-fourths of said land to said Uthe.

20 Wherefore this defendant has not had nor has the possession nor the title to such land nor to any part or parcel thereof, and this this defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him.

And for a third plea in this behalf this defendant says *actio non*, because he says that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendants in the sum of ten thousand dollars for money before that time lent and advanced to said plaintiff by said defendants, at said plaintiff's instance and request, and also in the like sum for money before that time paid, laid out, and expended for said plaintiff by the defendants, at the like special request of said plaintiff, and in the like sum for money before that time had and received by said plaintiff to and for the use of said defendants, and also in the like sum for goods, wares, and merchandise before that time sold and delivered by said defendants to said plaintiff, at the like special instance and request, and also in the like sum for labor, care, and diligence of said defendants before that time done and performed by defendants for plaintiff and at the like instance and request of plaintiff, and also in the like sum for other money before that time and then due and owing the defendants for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said plaintiff to the defendants, and also in the like sum then and there found to be due and owing from plaintiff to defendants in an account stated between them, which said sums of money so due from the plaintiff to the defendants exceed the damages sustained by the plaintiff by reason of the non-performance by the defendants of the several supposed promises in the said declaration mentioned and out of which said sums of money this defendant is ready and willing and hereby offers to set off and allow to

21 the plaintiff the full amount of said damages, and this this defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc.

MORTON CULVER.

Replication.

STATE OF ILLINOIS, }
Cook County. }

In the Circuit Court, Cook County, of the January Term, 1880.

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY.

And the said plaintiff, as to the plea of the said defendants by them (first) above pleaded, and whereof he has put himself upon the country, doth the like.

WM. H. CONDON,
Pl'ff's Att'y.

And the said plaintiff, as to the said plea of the said defendants by them (secondly) above pleaded, saith that the said plaintiff, by reason of anything by the said defendants in that plea alleged, ought not to — barred from having and maintaining her aforesaid action thereof against the said defendants or either of them because she saith that the consideration upon which said promissory notes were made has not wholly failed.

And the said plaintiff further saith that at the time of making and delivering to the said defendants the deed of the land set forth in said plea the said plaintiff, Gertrude Uthe, and Mary Ann
22 Martin and each of them were well seized of the parcel of land described and set forth in said deed, and every portion thereof, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and then had good right, full power, and lawful authority to grant, bargain, sell, and convey the same in fee simple, and that the defendants have had and have the possession and title to such land and every parcel thereof.

And this she, the said plaintiff, prays may be inquired of by the country, etc.

WM. H. CONDON,
Pl'ff's Att'y.

And be it remembered that on the 12th day of January, A. D. 1882, there was filed in said court a certain order reversing and remanding said cause; also a certain procedendo was filed from the appellate court; which said order and procedendo are in the words and figures following, to wit:

At a term of the appellate court, begun and held, at Chicago, on Tuesday, the fifth day of October, in the year of our Lord one thousand eight hundred and eighty, within and for the first district of the State of Illinois.

Present: The Honorable W. K. McAllister, presiding justice.
" " " Isaac G. Wilson, justice.
" " " Joseph M. Bailey, justice.

At the October Term, A. D. 1880.

MICHAEL GORMLEY and MORTON CULVER *vs.* GERTRUDE UTHE. } No. 554. Error Cook Circuit.

NOVEMBER 8TH, A. D. 1880.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error.

23

Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the circuit court of Cook county in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said Michael Gormley *et al.* recover of and from the said Gertrude Uthe their costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Eli Smith, clerk of the appellate court of the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] ELI SMITH,
Clerk of the Appellate Court of the First District.

STATE OF ILLINOIS, *Appellate Court,* } ss:

24

The People of the State of Illinois to the circuit court, Greeting:

Whereas — a certain plea which was before the circuit court of Cook county between Gertrude Uthe, plaintiff, and Michael Gormley *et al.*, defendants, the judgment of said circuit court of Cook county was rendered in favor of the said Gertrude Uthe and against the said Michael Gormley *et al.*, and the said Michael Gormley *et al.* having sued out a writ of error to the appellate court within and for the first district of said State, according to law, and the said appellate court having reversed the judgment of the said circuit court of Cook county and remanded said cause for a new trial—

We therefore command you and every one of you that you proceed with effect according to law, notwithstanding the said appeal.

Witness Hon. Isaac G. Wilson, presiding justice of the appellate court, and the seal thereof, at Chicago, this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] ELI SMITH,
Clerk of the Appellate Court of the First District.

And thereupon, on the 24th day of January, A. D. 1882, the following, among other, proceedings were had and entered of record in said cause, to wit:

GERTRUDE UTHE
vs. } 29318. Assumpsit.
MORTON CULVER and MICHAEL GORMLEY.

25 This day came the said plaintiff, by her attorney, and presented and filed the mandate of the appellate court of the first district of Illinois, and, on her motion, it is ordered that said cause be redocketed for further or other proceedings therein; to which order the said defendants, by their attorney, now here except.

And thereupon, on the 26th day of May, A. D. 1882, there was filed in said cause a certain demurrer in the words and figures following, to wit:

In the Circuit Court of Cook County, of the May Term, 1882.

GERTRUDE UTHE
vs.
MORTON CULVER, Impleaded with MICHAEL GORMLEY.

And the plaintiff, as to the plea of the defendant, Morton Culver, by him secondly and severally above pleaded, says that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar her, the plaintiff, from maintaining her aforesaid action, and that she is not bound by law to answer the same, and this she is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and her damages, &c., to be adjudged to her, &c., and the plaintiff shows to the court here the following causes of demurrer to the said second plea—that is to say:

The said plea is indefinite and uncertain in this, that wherein it is averred in the said plea that before the commencement of this suit the defendants offered to quitclaim and convey to the said Uthe a two-thirds part of said land it is not therein shown
26 whether the conveyance so offered was of an undivided two-thirds part of said land or of a two-thirds part thereof in severalty, by metes and bounds, and also for that the said plea is in other respects uncertain, informal, and insufficient, &c.

BOOTH & BOOTH,
Att'ys for Pl'ff.

And thereupon, on the 3d day of February, A. D. 1883, the following, among other, proceedings were had and entered of record in said cause, to wit:

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29,318, 253. Assumpsit.

On motion of said plaintiff, by her attorney, leave is granted her to withdraw her demurrer on file herein and to reply double to the pleas on file in said cause.

And thereupon, on the 3d day of February, A. D. 1883, there was filed in said cause certain replications in words and figures following, to wit:

STATE OF ILLINOIS, } *ss*:
County of Cook, }

In the Circuit Court of Cook County, of the January Term, 1883.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY, Impleaded with MORTON CULVER.

And the said plaintiff, as to the said plea of the said defend-
27 ant, Michael Gormley, by him secondly above pleaded, by her attorneys, saith that she ought not by reason of anything in that plea by the said defendant alleged to be barred from having and maintaining her aforesaid action thereof against the said defendants or either of them, because she saith that the consideration for which the said promissory notes were made has not wholly failed.

And the said plaintiff further saith that at the time of the making and delivery to the said defendants of the said deed of the land set forth and described in the said plea the said plaintiff, Gertrude Uthe, and the said Mary Ann Martin were each seized of the parcels of land set forth and described in the said deed and of every part thereof as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple as tenants, in common, to wit, the said plaintiff, Gertrude Uthe, of two undivided thirds thereof and the said Mary Ann Martin of one undivided third thereof, and they, the said Gertrude Uthe and Mary Ann Martin, had then and there good right, full power, and lawful authority to grant, bargain, sell, and convey the same.

And the said plaintiff further saith that the said defendant Gormley did not, together with his said codefendant Culver, at any time before the commencement of this suit, offer to quitclaim and convey to the said plaintiff an undivided two-thirds part of said parcel of land.

And the said plaintiff further saith that the said defendant Gormley, as tenant in common with the said defendant Culver, received from the said Uthe and Martin the possession and title of and to the said parcel of land and each and every part thereof.

And this the said plaintiff prays may be enquired of by the country, &c.

And the said plaintiff, for further replication to the said plea by the said defendant, Michael Gormley, secondly above pleaded,
28 by leave of court first had and obtained, says that she, by reason of anything in that plea alleged, ought not to be barred from having and maintaining her aforesaid action, because she says that the said defendants, of their own wrong and without the causes in the said plea alleged, committed the breaches of the said promises in that plea mentioned in manner and form as the plaintiff has above complained against the said defendants, and this the plaintiff prays may be enquired of by the country, &c.

BOOTH & BOOTH,
WM. H. CONDON,
Pl'ff's Att'ys.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County, of the January Term, 1883.

GERTRUDE UTHE
vs.
MORTON CULVER, Impleaded with MICHAEL GORMLEY.

And the said plaintiff, as to the said plea of the said defendant, Morton Culver, by him firstly above pleaded, whereof he has put himself on the country, doth the like, &c.

And the said plaintiff, as to the said plea of the said defendant, Morton Culver, by him secondly above pleaded, saith that she ought not, by reason of anything in that plea by the said defendant alleged, to be barred from having and maintaining her aforesaid action thereof against the said defendants or either of them, because she saith that the consideration for which the said promissory notes were made has not wholly failed.

And the said plaintiff further saith that at the time of the
29 making and delivery to the said defendants of the said deed of the land set forth and described in the said plea the said plaintiff, Gertrude Uthe, and the said Mary Ann Martin were well seized of the parcel of land set forth and described in the said deed and of every part thereof as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple as tenants in common, to wit, the said Gertrude Uthe of two undivided thirds thereof, and the said Mary Ann Martin of one undivided third thereof, and they, the said Gertrude Uthe and Mary Ann Martin, had then and there good right, full power, and lawful authority to grant, bargain, and sell and convey the same.

And the said plaintiff further saith that the said defendants did not at any time before the commencement of this suit offer, together with his said codefendant, to quitclaim and convey to the said plaintiff an undivided two-thirds part of said parcel of land.

And the said plaintiff further saith that the said defendant Mor-

ton Culver, as tenant in common with the said defendant Michael Gormley, received from the plaintiff and the said Mary Ann Martin the possession and title of and to the said parcel of land and every part thereof; and this the said plaintiff prays may be inquired of by the country, &c.

And the said plaintiff, for further replication to the said plea by the said defendant, Morton Culver, secondly above pleaded, by leave of the court first had and obtained, says that by reason of anything in said plea alleged she ought not to be barred from having and maintaining her aforesaid action, because she says that the said defendants, of their own wrong and without the causes in the said plea alleged, committed the breaches of the said promises in that plea mentioned in manner and form as the plaintiff has above complained against the said defendants; and this the plaintiff prays may be inquired of by the country, &c.

30 And the said plaintiff, as to the said plea of the said defendant, Morton Culver, by him thirdly above pleaded, saith that by reason of anything in said plea alleged she ought not to be barred from having and maintaining her aforesaid action against the said defendants, because she saith that she does [did] not, either before or at the time of the commencement of this suit, nor is she still nor has ever at any time been, indebted to the said defendants in the sum of ten thousand dollars nor any part thereof nor in any sum whatsoever for the causes in said plea set forth or either or any of them or for any cause whatever; and this the plaintiff prays may be inquired of by the country, &c.

BOOTH & BOOTH,
WM. H. CONDON,
Pl'ff's Att'ys.

And thereupon, on the 18th and 19th days of September, A. D. 1884, the following, among other, proceedings were had and entered on record in said cause, to wit:

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29,318, 122. Assumpsit.

This day came the parties at issue in said cause, by their respective attorneys, and thereupon also came the jurors of a jury of good and lawful men, to wit, George Harvey, Henry Singer, A. Kowalski, A. Burns, John Honlihan, John F. Mosgelin, C. Herzberg, M. Conroy, H. M. Garlick, P. McAuliff, W. Scully, and John Rush, who were duly impanelled and sworn to well and truly try the issues joined in said cause and a true verdict render according to the evidence, and who, after hearing the testimony adduced by the parties, arguments of counsel, and instructions given by the court, retired

31 from the bar of the court to consider of their verdict, with leave from the court, by agreement of counsel, that when they shall have agreed upon a verdict they may reduce it to writing, sign and seal the same, separate, and meet the court at the coming in thereof to-morrow afternoon.

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29318, 122. Assumpsit.

This day came again the parties at issue in said cause, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid and return into court their sealed verdict, whereby they do say: "We, the jury, find for the plaintiff and assess the damages in her favor to the amount of seven thousand and thirty-nine (7,039) dollars."

Whereupon the said defendants, by their attorneys, enter their motion to set aside said verdict and for a new trial of said cause; and thereupon, on the 25th day of November. A. D. 1884, the following, among other, proceedings were had and entered of record in said cause, to wit:

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29318, 122. Assumpsit.

This day came on — be heard the motion of said defendants to set aside the verdict of the jury aforesaid and for a new trial of said cause, and was argued by counsel, and the court, being fully advised in the premises, doth overrule said motion; to which ruling of the court the said defendants, by their attorneys, now except.

32 Wherefore it is ordered and considered by the court that said Gertrude Uthe, plaintiff, recover of said Morton Culver and Michael Gormley, defendants, ($7,039.00) seven thousand and thirty-nine dollars, her damages so as aforesaid by the jury assessed, together with her costs in this behalf expended, to be taxed, and have execution therefor.

To all of which said defendants, by their attorney, now here except and pray an appeal to the appellate court of the first district of Illinois, which is granted on condition that said defendants do, within thirty days from date, execute and file an appeal bond in said cause in the penal sum of seventy-five hundred dollars, with good and sufficient security thereto.

And it is further ordered that said defendants be, and they are, allowed thirty days from date in which to prepare and file a bill of exceptions in said cause.

And thereupon, on the same day, to wit, the 25th day of November, A. D. 1884, there was filed in said cause a certain writ of error from the appellate court in the words and figures following, to wit:

STATE OF ILLINOIS,
Appellate Court of the First District, } *ss:*

The People of the State of Illinois to the clerk of the circuit court for the county of Cook, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Cook

county before the judge thereof, between Gertrude Uthe, plaintiff, and Michael Gormley and Morton Culver, defendants, it is said manifest error hath intervened to the injury of the aforesaid Michael Gormley and Morton Culver, as we are informed by his com-
33 plaint, and we, being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that, if judgment thereof be given, you, distinctly and openly, without delay, send to our justices of the appellate court the records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid, at Chicago, in the county of Cook, on the first Tuesday of March next, that, the record and proceedings being inspected, we may cause to be done therein to correct the error what of right ought to be done according to law.

Witness the Hon. Isaac G. Wilson, presiding justice of our court, and the seal thereof, at Chicago, this 25th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] ELI SMITH,
Clerk of the Appellate Court of the First District.

And thereupon, on the 23d day of January, A. D. 1885, the following, among other, proceedings were had and entered of record in said cause, to wit:

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } 29318, 122. Assumpsit.

And now, at this day, by agreement of counsel, it is ordered that the time in which to file a bill of exceptions in said cause be, and it is extended, until the 24th instant.

And on the day and year last aforesaid, to wit, January 23d, A. D. 1885, there was filed in the clerk's office aforesaid a certain bill of exceptions, which is in words and figures as follows, to wit:

34 STATE OF ILLINOIS, }
County of Cook. }

Circuit Court of Cook County. September Term, A. D. 1884.

GERTRUDE UTHE
vs.
MORTON CULVER and MICHAEL GORMLEY. } Assumpsit.

Be it remembered that heretofore, to wit, on the 18th day of September, A. D. 1884, being one of the days of said term of said court, this cause came on for trial, upon the pleadings heretofore filed herein, before his honor Kirk Hawes, one of the judges of said court, and a jury, Hon. Henry Booth appearing for plaintiff, W. T. Burgess, Esq., appearing for defendants.

And thereupon the plaintiff, to maintain the issues on her part, introduced the following evidence:

Plaintiff Offers in Evidence the Notes Sued on.

$1,400. CHICAGO, *March* 23*d*, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred dollars, at Chicago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A.

[On margin:] This note is secured by trust deed of even date herewith.

$112. CHICAGO, *March* 23*d*, 1874.

Two years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 2.

35 Indorsed: Gertrude Uthe.

$112. CHICAGO, *March* 23*d*, 1874.

Three years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 3.

Indorsed: Gertrude Uthe.

$112. CHICAGO, *March* 23*d*, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 4, series A, No. 1.

$1,400. CHICAGO, *March* 23*d*, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred dollars at Chi-

cago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A, 2.

[On margin:] This note is secured by trust deed of even date herewith.

$112. CHICAGO, *March* 23*d*, 1874.

Three years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
36 MICHAEL GORMLEY.

Interest note 3, series A, No. 1.

Indorsed: Gertrude Uthe.

$112. CHICAGO, *March* 23*d*, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 4.

$1,461.67. CHICAGO, *March* 23, 1874.

Four years after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of fourteen hundred sixty one $\frac{67}{100}$ dollars at Chicago, Illinois, with interest at eight per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Principal note, series A, 3.

[On margin:] This note is secured by trust deed of even date herewith.

$116.93. CHICAGO, *March* 23, 1874.

Two years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and sixteen $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 3.

Indorsed: $58.93 paid on within note March 27, 1876. Gertrude Uthe.

$116.93. CHICAGO, *March* 23, 1874.

Three years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hun-
37 dred sixteen and $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 3, series A, No. 3.

Indorsed: Gertrude Uthe.

$116.93. CHICAGO, *March* 23, 1874.

Four years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred sixteen $\frac{93}{100}$ dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 4, series A, No. 3.

Notes objected to by defendants; objection overruled by the court and exception by defendants.

SAMUEL M. BOOTH, having been first duly sworn on the part of the plaintiff, was examined in chief by Judge BOOTH, and testified as follows:

Have made a computation of the interest upon these notes which have been offered in evidence here. The total, principal and interest, computed up to date, amounts to $7,939.63.

Q. Did you deduct the endorsement and payment on one of those coupons there?

A. I did not figure it in at all; I figured the amount on that coupon as $58.

Q. That is deducting the payment that had been made on it?

A. Deducting the payment. It is endorsed on it $58.93; the amount was $116.93.

Cross-examination waived.

The plaintiff here rests.

And thereupon the defendants, to maintain the issues on
38 their part, introduced the following evidence, to wit:

MORTON CULVER, one of the defendants herein, having been first duly sworn on the part of the defendants, was examined in chief by Mr. BURGESS, and testified as follows:

Name is Morton Culver, one of the defendants in this suit; the other defendant is Michael Gormley, the gentleman sitting over there. These notes that have been produced here are signed by me and him. The payee in the notes is Gertrude Uthe; was acquainted with her at that time; will give the transaction out of which those notes sprang, leading up to it and the consideration for

which they were given. Gertrude Uthe and one Mary Ann Martin, who were sisters, claimed to be the owners of the southeast quarter of section 12, township 42, range 12, and they came to my office, in the city of Chicago, room 4, Metropolitan block, and wanted to sell this land—160 acres—to Michael Gormley and me; they said that Mary Ann Martin was the owner of a third—of an undivided third—and that Gertrude Uthe was the owner of an undivided two-thirds; that their father got it from the United States by a patent; and I asked them to show me their patent, and they hadn't it and did not know where it was.

They also owned another 40 acres in section 7, 42, 13, and they made a division among themselves about the 40 acres and about the 160, which latter they agreed to sell to Mr. Gormley and me for 40 dollars an acre; Mary Ann Martin was to have a part of the money and Gertrude Uthe not any, and they divided the land between, and Mary Ann Martin took the northeast quarter of this 160 acres and Gertrude Uthe the balance.

Objected to by plaintiff.

A. They divided this 160 acres between them so that Mary Ann Martin should have the northeast quarter; it was better land. She should have a quarter of it for her third interest in the land.

The COURT: There is only one party before the court now
39 as plaintiff.

A. But they were both together in my office when all this talk was had.

Mr. BURGESS: Proceed.

A. Then it was agreed between all 4 of us—that is, Michael Gormley and myself and Gertrude Uthe and Mary Ann Martin—that Mary Ann Martin should take the northeast quarter of this 160 acres, and we paid her some money and gave her a mortgage back on the northeast quarter of this 160, and then we divided up the two-thirds of the $6,400 which was to go to Gertrude, and she took one-third of that amount or about a third, $1,400, in the second case, and $1,400 and something over in the third case; she took a mortgage on each of the other forties.

Judge BOOTH: I call for the papers.

A. Well, I will show you here the mortgages for the three forties to her, and here are the notes, a portion of the coupons—all the coupons except what we have paid that go with these mortgages.

Mr. BURGESS: We offer them in evidence, Documents 159,254, 159,252, and 159,253—the 3 mortgages.

This indenture, made this twenty-third day of March, in the year of our Lord one thousand eight hundred and seventy-four, between Morton Culver and Michael Gormley, of the first part, and Gertrude Uthe, of the second part.

Whereas the said party of the first — is justly indebted to the said party of the second part in the sum of fourteen hundred dollars secured to be paid by certain promissory notes, bearing even

date herewith, payable four years from date, with interest at the rate of eight per cent. per annum, evidenced by four coupon notes of $112.00 each, due in one, two, three, and four years from date, given to secure unpaid purchase-money of the real estate hereinafter described:

Now, therefore, this indenture witnesseth: That the said
40 party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory notes above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, aliened, and conveyed, and by these presents do grant, bargain, sell, remise, alien, and convey, unto the said party of the second part, her heirs and assigns forever, all the following-described lots, pieces, or parcels of land, situate in the county of Cook and State of Illinois, to wit: "The southwest quarter of the southeast quarter of section twelve, township forty-two north, of range twelve east, of the third principal meridian," together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any way appertaining, with the rents, issues, and profits thereof, and all the estate, interest, and claim whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed:

To have and to hold the same, with the appurtenances, unto the said party of the second part, her heirs, executors, administrators, and assigns, and to their own proper use, benefit, and behoof: Provided always, and these presents are upon this express condition, That if said party of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said party of the second part, her heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time and in the manner specified in the above-mentioned promissory notes, according to the time, intent, and manner thereof, then these presents and everything herein expressed shall be absolutely null and void.

41 But in case of default in the payment of the said notes above mentioned or any part thereof, according to the tenor and effect thereof, or in any of said coupon interest notes thereunto attached, the said party of the second part, her legal representatives or attorney, after having advertised such sale four weeks in a newspaper published in the city of Chicago, Cook county, Illinois, may sell the said premises or any part thereof and all right and equity of redemption of the said party of the first part, heirs, executors, administrators, or assigns, therein, at public vendue, to the highest bidder, for cash, at the sheriff's office of Cook county, in Chicago, Cook county, Illinois, at the time appointed in such advertisement, or may adjourn the sale from time to time at discretion, and upon the making of such sale or sales the attorney of the said party of the first part, for such purposes hereby constituted irrevocable or in the name of the said party of the second part or their legal representatives,

shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold and shall apply the proceeds of sale to the payment of (1) expenses of advertising, selling, and conveying as aforesaid, including attorneys' fee, and (2) the amount due in said notes, (3) rendering the overplus, if any, to the said party of the first part or their assigns at the office of the said party of the second part, in Chicago.

And the said Morton Culver and Michael Gormley, parties of the first part, hereby expressly waive, release, and relinquish unto the said party of the second part, her heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatsoever in and to the above-described premises and each and every part thereof which is given by or results from all laws of this State pertaining to the exemption of homesteads.

42 And the said Culver and Gormley, party of the first part, covenant with the said party of the second part, her heirs, executors, administrators, or assigns, that they are seized in fee of the said premises and have good right to convey the same as aforesaid; that they are free from all incumbrances, and that they will forever warrant and defend the same against all lawful claims.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

MORTON CULVER. [SEAL.]
MICHAEL GORMLEY. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

I, Albert D. Bingham, a notary public in and for the said county, in the State aforesaid, do hereby certify that Morton Culver and Michael Gormley, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and seal and notarial seal this 28th day of March, A. D. 1874.

[NOTARIAL SEAL.] A. D. BINGHAM,
Notary Public.

No. 159,253. Filed for record this 31 day of March, A. D. 1874, at — o'clock m., and recorded this 20th day of April, A. D. 1874, in Book 365 of Records, page 147.

JAMES STEWART, *Recorder.*

43 This indenture, made this twenty-third day of March, in the year of our Lord one thousand eight hundred and seventy-four, between Morton Culver and Michael Gormley, of the first part, and Gertrude Uthe, of the second part.

Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of fourteen hundred six-

teen $\frac{67}{100}$ dollars, secured to be paid by a certain promissory note, bearing even date herewith, payable four years from date, with interest at the rate of eight per cent. per annum, and evidenced by four coupon notes of $116.93 each, due in one, two, three, and four years from date, given to secure unpaid purchase-money of the land hereinafter described.

Now, therefore, this indenture witnesseth: That the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, delivered, and conveyed, and by these presents do grant, bargain, sell, remise, alien, and convey, unto said party of the second part, her heirs and assigns forever, all the following-described lots, pieces, or parcels of land, situate in the county of Cook and State of Illinois, to wit: The northwest quarter of the southeast quarter of section twelve, township forty-two north, of range twelve east, of the third principal meridian, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any way appertaining, with the rents, issues, and profits thereof, and all the estate, interest, and claim whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed; to have and to hold the same, with the appurte-
44 nances, unto the said party of the second part, her heirs, executors, administrators, and assigns, and to their own proper use, benefit, and behoof:

Provided always, and these presents are upon this express condition, That if said party of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said party of the second part, her heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time and in the manner specified in the above-mentioned promissory note, according to the time, intent, and manner thereof, then these presents and everything herein expressed shall be absolutely null and void.

But in case of default in the payment of the said notes above mentioned or any part thereof, according to the tenor and effect thereof, or in any of said coupon interest notes thereunto attached, the said party of the second part, her legal representative or attorney, after having advertised such sale four weeks in a newspaper published in the city of Chicago, Cook county, Illinois, may sell the said premises or any part thereof, all right and equity of redemption of the said party of the first part, their heirs, executors, administrators, or assigns, therein, at public vendue, to the highest bidder, for cash, at the office of the sheriff of Cook county, in Chicago aforesaid, at the time appointed in such advertisement, or may adjourn the sale from time to time at discretion, and upon the making of such sale or sales *as* the attorney of the said party of the first part, for such purposes hereby constituted irrevocable,

or in the name of the said party of the second part or the legal representatives, shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold and shall apply the proceeds of sale to the payment of (1) expenses of advertising, selling, and conveying as aforesaid, including attorneys' fees, and (2) the amount due on said note, (3) rendering the overplus, if any, to the said party of the first part or their assigns at the office of the said party of the second part, in Chicago; and the said Morton Culver and Michael Gormley, parties of the first part, hereby expressly waive, release, and relinquish unto the said party of the second part, her heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatsoever in and to the above-described premises and each and every part thereof, which is given by or results from all laws of this State pertaining to the exemption of homesteads.

And the said Culver and Gormley, party of the first part, covenant with the said party of the second part and her heirs, executors, administrators, or assigns that they are seized in fee of the said premises and have good right to convey the same as aforesaid; that they are free from all incumbrance, and that they will forever warrant and defend the same against all lawful claims.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year above written.

MORTON CULVER. [SEAL.]
MICHAEL GORMLEY. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

I, Albert D. Bingham, a notary public in and for the said county, in the State aforesaid, do hereby certify that Morton Culver and Michael Gormley, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and seal and notarial seal this 28 day of March, A. D. 1874.

[NOTARIAL SEAL.] A. D. BINGHAM,
Notary Public.

No. 159,254. Filed for record this 31 day of March, A. D. 1874, at — o'clock m. and recorded this 20th day of April, A. D. 1874, in Book 365 of Records, page 148.

JAMES STEWART, *Recorder.*

This indenture, made this twenty-third day of March, in the year of our Lord one thousand — and seventy-four, between Morton Culver and Michael Gormley, of the first part, and Gertrude Uthe, of the second part:

Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of fourteen hundred dollars, secured to be paid by a certain promissory note, bearing even date herewith, payable four years from date, with interest at the rate of eight per cent. per annum, and evidenced by four coupon notes of $112 each, due in one, two, three, and four years from date, given to secure unpaid purchase-money of the real estate hereinafter described:

Now, therefore, this indenture witnesseth: That the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said promissory notes above mentioned, and also in consideration of the further sum of one dollar to — in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, aliened, and conveyed, and by these presents do grant, bargain, sell, remise, alien,
47 and convey, unto the said party of the second part, her heirs and assigns forever, all the following-described lots, pieces, or parcels of land situate in the county of Cook and State of Illinois, to wit: The southeast quarter of the southeast quarter of section twelve, township forty-two north, of range twelve east, of the third principal meridian, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any way appertaining, with the rents, issues, and profits thereof, and all the estate, interest, and claims whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed; to have and to hold the same, with the appurtenances, unto the said party of the second part, her heirs, executors, administrators, and assigns, and to their own proper use, benefit, and behoof: Provided always, and these presents are upon this express condition, That if the said party of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said party of the second part, her heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time and manner specified in the above-mentioned promissory note, according to the time [true] intent and meaning thereof, then these presents and everything herein expressed shall be absolutely null and void; but in case of default in the payment of the said notes above mentioned or any part thereof, according to the tenor and effect thereof, or in any of said coupon interest notes thereunto attached the said party of the second part, her legal representatives or attorney, after having advertised such sale four weeks in a newspaper published in the city of Chicago, Cook county, Illinois, may sell the said premises or any part thereof and all right and equity of redemption of the said party of the first part, their heirs, executors, administrators, or assigns, therein, at public
48 vendue, to the highest bidder, for cash, at the sheriff's office of Cook county, in Chicago, Cook county, Illinois, at the time appointed in such advertisement, or may adjourn the sale from time to time at discretion, and upon the making of such sale or sales *as* the attorney of the said party of the first part, for such purposes

hereby constituted irrevocable, or in the name of the said party of the second part or the legal representatives, shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold, and shall apply the proceeds of sale to the payment of (1) expenses of advertising, selling, and conveying as aforesaid, including attorney's fees, and (2) the amount due on said notes, (3) rendering the overplus, if any, to the said party of the first part or their assigns at the office of the said party of the second part, in Chicago; and the said Morton Culver and Michael Gormley, parties of the first part, hereby expressly waive, release, and relinquish unto the said party of the second part, her heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatsoever in and to the above-described premises and each and every part thereof which is given by or results from all laws of this — pertaining to the exemption of homesteads; and the said Culver and Gormley, party of the first part, covenant with the said party of the second part and his heirs, executors, administrators, or assigns that they are seized in fee of the said premises and have got [good] right to convey the same as aforesaid; that they are free from all incumbrances, and that they will forever warrant and defend the same against all lawful claims.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first written above.

MORTON CULVER. [SEAL.]
MICHAEL GORMLEY. [SEAL.]

49 STATE OF ILLINOIS, } ss:
Cook County, }

I, Albert D. Bingham, a notary public in and for the said county, in the State aforesaid, do hereby certify that Morton Culver and Michael Gormley, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and seal and notarial seal this 28th day of March, A. D. 1874.

[NOTARIAL SEAL.] A. D. BINGHAM,
Notary Public.

No. 159,252. Filed for record this 31 day of March, A. D. 1874, at — o'clock m., and recorded this 20th day of April, A. D. 1874, in Book 365 of Records, page 146.

JAMES STEWART, *Recorder.*

A. Now, these notes were given for the entire purchase-money of the southeast quarter of this 160, the northwest quarter of the 160, and the southwest quarter of the 160. One set of notes was given for each 40 and a trust deed to secure it. Then the question arose about whether they should first make a division between themselves

in writing and have the deeds recorded or whether they should give a joint deed to Michael Gormley and me for the 160 acres, and I suggested to them it would save two or three conveyances, and so they gave us a joint deed of the land.

Q. Where is that deed?

A. I think I have it in my pocket. (Witness produces same.)

Deed offered in evidence, dated March 23d, 1874, from Mary Ann Martin and husband and Gertrude Uthe to defendants.

This indenture, made this twenty-third day of March, in the year of our Lord one thousand eight hundred and seventy-four, between Mary Ann Martin, of her own right, joined by her husband, Charles T. Martin, and Gertrude Uthe, spinster, party of the first part, and Morton Culver and Michael Gormley, of the village of Glencoe, in the county of Cook and State of Illinois, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the sum of sixty-four hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm, unto the said party of the second part and to their — and assigns forever all the following-described lots, pieces, or parcels of land, situated in the county of Cook and State of Illinois and known and described as follows, to wit:

The southeast quarter of section numbered twelve (12), of township forty-two (42) north, of range twelve (12) east, of the third principal meridian, containing 160 acres of land, more or less, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto the
51 said party of the second part, their heirs and assigns forever.

And the said Mary Ann Martin, Charles T. Martin, and Gertrude Uthe, party of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, their heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances

of what kind or nature soever; and the above-bargained premises in the quiet and peaceable possession of the said party of the second part, their heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, *and* the party of the first part shall and will warrant and forever defend.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

MARY ANN MARTIN. [SEAL.]
CHARLES T. MARTIN. [SEAL.]
GERTRUDE UTHE. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDWARD R. SLAWSON.
GEO. P. COBB.

52 Endorsement.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Albert D. Bingham, a notary public in and for said county, in the State aforesaid, do hereby certify that Gertrude Uthe (unmarried), personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 28th day of March, A. D. 1874.

[NOTARIAL SEAL.] A. D. BINGHAM,
Notary Public.

STATE OF MICHIGAN, } ss:
County of Bay, Bay City, }

I, Edward R. Slawson, a notary public in and for the said county of Bay, in the State aforesaid, do hereby certify that Mary Ann Martin and Charles Martin, her husband, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein

set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this twenty-fifth day of March, A. D. 1874.

EDWARD R. SLAWSON,
[L. S.] *Notary Public.*

53 STATE OF MICHIGAN, } ss:
County of Bay, }

I, Henry A. Braddock, clerk of said county and clerk of the circuit court for the county of Bay, do hereby certify that Edward R. Slawson, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument and therein written, was at the time of taking such proof or acknowledgment a notary public in and for said county, duly appointed and qualified and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to the said certificate of proof of acknowledgement is genuine.

I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Bay City, this 25 day of March, A. D. 1874.

[SEAL.] H. A. BRADDOCK, *Clerk.*

Warranty Deed.

Mary Ann Martin and husband and Gertrude Uthe to Morton Culver and Michael Gormley.

STATE OF ILLINOIS, } ss:
Cook County, }

No. 158,817.

This instrument was filed for record in the recorder's office of Cook county aforesaid on the 28th day of March, A. D. 1874, at — o'clock m., and recorded in Book 373 of Records on page 168, April 16th.

(Sig'd) JAMES STEWART, *Recorder.*

Deed objected to by plaintiff.

Received subject to objection and exceptions by plaintiff.

54 Q. Do you know the lands described in that deed?

A. Yes, sir; I know that land well. I was going to state further the whole conversation that I had with those two ladies about the land.

Q. At or about the time of making this deed?

A. Yes, sir; at the time of making the deed—these three trust deeds.

Q. In the course of the transaction going on?
A. Yes, sir.
Q. Well, proceed.
A. I asked them how they got the title, and they said their father got it by a patent from the United States; that he had been a soldier in the Mexican war, and that he had died leaving Gertrude, Mary Ann, and a son named Frederick his only heirs, and that therefore they were each entitled to a third; that afterwards Frederick died, and that he had willed his share of it to Gertrude; so Gertrude claimed to be the owner of an undivided two-thirds and Mary Ann an undivided one-third. Now I know the land.
Q. Very well.
A. I have known it to my sorrow ever since I bought it; have known it since 1874. The land is all swamp land except about 4 acres in the northeast quarter, a corner of the northeast quarter of this 160 acres. It is covered with water the year round. There are some first-rate ducking-ponds in it, where the neighbors go shooting once in a while. It is a natural swamp; it is part of a swamp up there that is about 8 miles long and a mile and a half wide, and I understand it is one of the heads of the North Branch river, although I never followed it down to the North Branch, but I have been over the land, part of it, several times shooting
55 ducks. It is natural swamp covered by water. It cannot be cultivated for anything at all that I know of, and if you could cultivate anything I do not know how you would get it out, for I wore hip boots pretty nearly every time I went in there, and the water got over my hip rubber boots, and there are places where the water is over your head. That condition of affairs exists there the whole year round.
Q. Have you anything more, Mr. Culver?
A. Yes; there is a patent from the United States. They told me they did not have any patent, and I sent to Washington for an exemplified copy of the patent that was issued, and I got this back. That was after we bought the land and had paid several coupons.

The patent referred to offered in evidence by defendants.

The United States of America to all to whom these presents shall come, Greeting:

Know ye that, in pursuance of an act of Congress entitled An act to raise for a limited time an additional military force, and for other purposes, approved February 11th, 1847, Christopher F. Uthe, late a private — Captain Kinny's company, First Regiment Illinois Volunteers, having deposited in the General Land Office a warrant in his favor, numbered 37714, there is therefore granted by the United States unto the said Christopher F. Uthe and to his heirs the southeast quarter of section twelve, in township forty-two north of range twelve east, in the district of lands subject to sale at Chicago, Illinois, containing one hundred and sixty acres, according to the offi-

cial plat of the survey of the said land returned to the General Land Office by the surveyor general, which said tract has been located in satisfaction of the above-mentioned warrant in pursuance of the act of Congress above mentioned, approved February 11th, 1847:

56 To have and to hold the said quarter section of land, with the appurtenances thereof, unto the said Christopher F. Uthe and to his heirs and assigns forever.

In testimony whereof I, Millard Fillmore, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the tenth day of February, in the year of our Lord one thousand eight hundred and fifty-one, and of the Independence of the United States the seventy-fifth.

MILLARD FILLMORE.

By the President:

By ALEX. McCORMICK,
Ass't Secretary.

E. S. TERRY,
Recorder of the General Land Office.

Recorded vol. 39, page 482.

Now, we have a plea of set-off. We have made some payments on this land. I have 4 of the surrendered coupons, which I want to offer in evidence as a set-off. That is all that I have got. Then, besides that, we have paid $58.93 on the 27th of March, 1876, on this note that is marked "Interest note, series A, No. 3," for $116.93, one of the notes offered in evidence by the plaintiff. I offer that coupon in evidence. We have got a plea of set-off in.

The COURT: What is the sum total of them?

A. We can offer them to the jury and state the amount and they can figure it themselves.

Defendants offer in evidence 4 coupon notes, dated March 23d, 1874, from defendants to plaintiff, which are marked across the face "paid."

$116.93. CHICAGO, *March 23d*, 1874.

One year, without grace, after date, for value received, we promise to pay to the order of Gertrude —— the sum of one hundred sixteen and $\frac{93}{100}$ dollars, with interest at ten per cent. per annum

57 after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 1, series A, No. 3.

[Written across face:] Paid.

$112. CHICAGO, *March* 23, 1874.

One year, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 1.

[Written across face:] Paid.

$112. CHICAGO, *March* 23*rd*, 1874.

One year, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 1, series A, No. 1.

[Written across face:] Paid.

$112. CHICAGO, *March* 23*d*, 1874.

Two years, without grace, after date, for value received, we promise to pay to the order of Gertrude Uthe the sum of one hundred and twelve dollars, with interest at ten per cent. per annum after maturity.

MORTON CULVER.
MICHAEL GORMLEY.

Interest note 2, series A, No. 1.

[Written across face:] Paid.

Mr. BURGESS: What is this paper that you have in your hand, Mr. Culver?

A. This is a quitclaim deed.

58 Q. Of what property?

A. West half southeast quarter, southeast quarter section twelve. I will state when we found out this title was not good Michael Gormley and I offered to quitclaim her back the property and she made the remark she would have all the money or have our hearts' blood, and on the trial before we tendered her a quitclaim deed of this property, and I have a quitclaim deed here and I tender it again.

The quitclaim deed referred to is offered in evidence by defendants.

This indenture witnesseth, That the grantors, Michael Gormley and Eliza Gormley, his wife, Morton Culver and Eugenia M. Cul-

ver, his wife, of the village of Glencoe, in the county of Cook and State of Illinois, for the consideration of one dollar and other good and valuable considerations, convey and quitclaim to Gertrude Uthe, of ——, county of ——, and State of ——, all interest in the following-described real estate, to wit:

The west half of (W. ½ of) and the southeast quarter of (S. E. ¼) the southeast quarter (S. E. ¼) of section twelve (12), township forty-two (42) north, of range (12) east, of the third P. M., situated in the county of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Dated this 20th day of January, A. D. 1880.

(Signed) MICHAEL GORMLEY. [SEAL.]
ELIZA GORMLEY. [SEAL.]
MORTON CULVER. [SEAL.]
EUGENIA M. CULVER. [SEAL.]

Endorsement.

59 STATE OF ILLINOIS, } ss:
County of Cook, }

I, John E. Sundstrom, a notary public in and for said county, in the State aforesaid, do hereby certify that Michael Gormley and Eliza Gormley, his wife, Morton Culver and Eugenia M. Culver, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 20th day of January, A. D. 1880.

[NOTARIAL SEAL.] (Sign'd) JOHN E. SUNDSTROM,
Notary Public.

Objected to because it does not convey the same property to the same parties as conveyed the property originally to defendants.

Mr. BURGESS: I will state that we are willing to make such a conveyance as the parties are willing to accept or to reconvey the title if this is not sufficient.

Tender ruled out by the court and exception by defendants.

Mr. BURGESS: We will convey to the two persons who conveyed to us the title as it was at the time it was conveyed to us.

The WITNESS: We cannot do anything of the kind—make any such tender, because Mary Ann Martin foreclosed her mortgage and run it through the United States court here and did something or other with it, and we cannot do it.

Mr. BURGESS: We offer to make a quitclaim deed of the whole quarter—that is, our interest, whatever we acquired—to the
60 present plaintiff and to Mrs. Martin.

Offer objected to and objection sustained by the court.
Exception by defendants.

Q. What, if anything, has become of the title to the other one-fourth not covered by the quitclaim deed offered in evidence?

Objected to.

A. I can testify what I did.
Q. At the time you obtained this deed who was in possession of this property?
A. Nobody.
Q. Who has been in possession of it since?
A. Nobody.
Q. What, if any, acts of ownership have been exercised over it by you?
A. Not a thing.
Q. Or Mr. Gormley?
A. Not a thing.
Q. What condition is it in now?
A. Well, it is — about the same condition it was when I first saw it.
Q. In reference to its occupation?
A. Oh, it is vacant, unoccupied land.
Q. Has been ever since?
A. The same as I suppose it was 500 years ago.

Cross-examination by Judge BOOTH:

Q. Mr. Culver, where did — live at the time when you made this purchase of this land?
A. In the village of Glencoe.
Q. How long had you lived there?
A. Well, I have lived there 11 years.
Q. At that time?
A. No; let me look at the deed and I will tell you. I had
61 lived there, I suppose, pretty nearly a year about 10 months.
Q. How far is this land from the village of Glencoe?
A. It is west and adjoining the village line.
Q. Immediately adjoining the village line?
A. Yes, sir.
Q. You are a lawyer, I believe—a member of the Chicago bar?
A. Yes, sir; I believe your belief is right; I studied law under you.
Q. Well, Mr. Culver, how did you become acquainted with these ladies, Mrs. Martin and Miss Uthe?
A. Well, I cannot answer that question; I do not remember when I first saw them nor when I first got acquainted with them, but it was after I moved to Glencoe.
Q. You thought they came to your office?
A. Yes, sir.
Q. Offering to sell this property?
A. Yes, sir.
Q. Was that the first time you had any interview with them?

A. I have an idea, to the best of my recollection, the first time I ever saw Mary Ann Martin was then, because she lived in Michigan.

Q. You had seen Miss Uthe before?

A. Yes, sir; probably I had; I have no very distinct recollection now.

Q. Now, didn't you make a proposition to them first to buy this land—in other words, didn't you propose it to them rather than they to you?

A. No, because they were anxious to sell.

Q. You swear, then, that they came to you in the first place with a proposition to sell the land without your having proposed to buy?

A. Yes, I do that.

62 Q. Without your having any communication or indicating to them a desire to purchase?

A. I think that is the fact, Judge.

Q. Well, are you sure?

A. Well, I will tell you. I do not want to swear positively to anything prior to the conversation that we 4 had in my office. Mr. Gormley lived in Glencoe and I was well acquainted with him, and he and I talked a good deal about buying real estate, and I cannot tell definitely about the prior conversations.

Q. You were then concerned jointly with Mr. Gormley in real estate speculations to some extent?

A. No, sir; never was except in this piece of land.

Q. Was Mr. Gormley at your office at the time of this purchase?

A. I think he was.

Q. How came he to be with you at the time?

A. I cannot tell you. I bought land of Mr. Gormley, and he used to come to my office pretty often; we had a good many transactions between ourselves.

Q. Let me inquire whether Mr. Gormley did not go to your office with these ladies?

A. He may have done so; I could not say he did not. I remember the deal of my own first rate in the office.

Q. What did you buy this land for, Mr. Culver; did you and Mr. Gormley expect to make a farm of it?

A. Yes, I did; I will tell you what we expected to do. Land was booming at that time in Glencoe and sales were pretty good, and I thought this piece of land, 7 miles long and a mile wide, might be drained, and if we could drain it and get rid of the swamp it would make a mighty good piece of land, and will now.

Q. That is the case now, is it not?

A. Yes, sir.

Q. It is a good piece of land if it is only drained?

63 A. Yes, sir; if you can get off only 10 feet of water it is tip-top land; as good as there is — Cook county.

Q. Mr. Culver, do you mean to swear there is over 10 feet of water on top of that land?

A. Oh, yes; yes, sir.

Q. Where does that water flow to?

A. Well, several years ago——

Q. Where does it flow to?

A. That is what I am going to tell you. Several years ago there was a drainage commission appointed to drain this piece of land and Michael Gormley was one of them, and they cut a ditch through a sand hill which reached down to Grosse Point, and undertook to run the water off and did run a little off, so when the water gets above the level of that ditch it runs off that ditch.

Q. Does it flow into the north branch of the Chicago river?

A. Which, this swamp?

Q. Yes, sir.

A. I have heard so; I do not know.

Q. I understood you to say that it was tributary to the north branch of the Chicago river?

A. Well, you are mistaken if you understood it that way. I said I had heard it was, but that I had never been down to see whether it run into the north branch or not.

Q. You never explored the outlet?

A. No, sir; never went down.

Q. You say the water stands 10 feet deep on this land?

A. I say sometimes it does; in the spring it will be 10 feet high and then in summer, in the dry season, it will be about—I know in some places it is over a man's head, for I have seen fellows go in to shoot ducks.

Q. Did you not buy it for the duck privileges?

64 A. No, sir; because everybody used that.

Q. Well, what use have you made of this land?

A. Not any.

Q. Has not Mr. Gormley made any use of it?

A. Not that I know of.

Q. Don't you know that he made hay upon it?

A. I do not know that he ever made hay on a foot of this land—this 120.

Q. Don't you know that he cut hay upon the other 40?

A. Yes, sir.

Q. You do?

A. Yes, sir; as I have stated before, there are about——

Q. One moment.

A. There are about 4 or 5 acres that are good.

Q. How many times did he cut hay there?

A. Well, when it comes to my swearing he ever cut hay I don't know it.

Q. Didn't you ever see hay cut there?

A. No.

Q. How came you to have the impression he cut hay there?

A. Well, I heard he had been cutting there; that is the way.

Q. Heard that he had cut hay there?

A. Well, I cannot say that I ever heard he cut hay there.

Q. Didn't you hear him swear on the former trial of this case that he cut hay there?

A. I don't remember that he swore so; no, sir; I do not remember much what happened 3 years ago on the trial of this case; I did not charge my mind with it.

Q. And you continued to pay coupons on these notes—how many of them did you say?

A. I do not remember; I offered them in evidence once.

65 I will answer your question by getting the coupons. The last payment was the one that was made on the coupon you offered in evidence. We paid 4 coupons in full and part of a fifth, I believe.

Q. You paid one coupon on each note and 2 on one of them?

A. Well, the coupons will show for themselves; I cannot tell about that.

Q. Those represent annual payments of interest on those notes?

A. I do not know whether they do or not. Show me the notes and I will tell you.

Q. Well, $112 on $1,400 would be the interest at 8 per cent.

A. Well, I presume, Judge, the papers show pretty well for themselves what they show.

Q. You have stated these ladies told you that their father, Christopher, was a soldier of the Mexican war and he had a patent from the United States of this land as bounty land, as I understood you to say in substance.

A. No, sir; I did not say anything about bounty land; I said all the rest, though; that he got a patent from the United States, but for what purpose or what reason they did not state to me, as I know of

Q. Did you buy this land upon their representation of their title to it?

A. Yes, sir; I hadn't anything else to show.

Q. Do you swear that you had no abstract of the title?

A. They got an abstract, I believe, from Handy, Simmons & Co. or Handy and Co.—Handy, Simmons and Co., I believe.

Q. Haven't you got that abstract in your possession?

A. No.

Q. Don't you know there was such an abstract offered on the former trial?

A. What is that?

66 Q. Don't you know there was such an abstract produced on the former trial?

A. I know this, Judge.

Q. Well, answer that.

A. Well, I am going to answer it. I know that you insisted that I had an abstract, and I brought in a paper — purported to be an abstract, and you tried to offer it in evidence and Judge Rogers ruled it out; that is a fact.

Q. Then you examined an abstract previous to purchasing, didn't you?

A. No.

Q. Do you swear that you bought this property, Mr. Culver, without knowing anything about the title beyond what these women told you?

A. No, I do not; Michael Gormley told me that was the way the title run.

Q. And you took it, then, and made this investment upon the

strength of what Michael Gormley told you the way the title run and the statement of these women?

A. Yes, sir.

Q. Michael Gormley is not a lawyer, is he?

A. No.

Q. Did you ever buy any land before or since in that way?

A. I bought land before, but I have been mighty careful not to buy any since without knowing what I was about. I bought several pieces of land without an abstract. I did not know the difference.

Q. How long had you been at the bar at this time?

A. A couple of years.

Q. You knew what abstracts were, didn't you?

A. Yes.

Q. Who has the title to this property now?

67 A. Well, which part do you mean, the whole of it?

Q. Yes; the whole of it.

A. Well, this 120 acres—the title is in my wife.

Q. You conveyed it to her?

A. No; I did not.

Q. Where did she get it?

A. Michael Gormley conveyed an undivided half of it to a man, John L. Day, and my wife and I conveyed an undivided half to John L. Day, and John L. Day conveyed it by quitclaim to my wife, so that the title might not be clouded and we could tender it back to this woman. There were judgments against me—there were going to be—and I did not propose this should be ever taken away by any judgments until your folks had a chance.

Q. And you conveyed it to your wife for the purpose of putting it beyond the reach of your creditors?

A. Yes, sir; any creditors except Gertrude Uthe.

Q. Where is that quitclaim deed that you have offered in evidence, if you please?

Witness produces same.

A. Now, the other 40 I will answer about when you get ready. Now, then, the other 40 we mortgaged to Mary Ann Martin for her share, and that was foreclosed in the United States circuit court for the northern district of Illinois and sold at master's sale—the northeast quarter of this 160; that was the portion that Mary Ann took for her share; that was foreclosed in the United States court and was sold by Henry W. Bishop, master in chancery, to her.

Q. Did she get a deed of it?

A. I do not know whether she did or not. Sold to the complainant, at any rate, and she was the complainant in the case.

Q. Have you redeemed it?

68 A. Oh, no.

Defendants offer the United States Statutes in evidence, act September 28th, 1850, IX Statutes at Large, page 519.

Swamp Lands.

Act September 28th, 1850, 9 Stat. at Large, p. 519.

P. 1. To enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State.

P. 2. It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the State Arkansas, subject to the disposal of the Legislature thereof:

Provided, however, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

P. 3. In making out a list and plats of the land aforesaid all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom.

P. 4. The provisions of this act be extended to and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands, known and designated as
69 aforesaid, may be situated.

Objected to by plaintiff.
Received subject to objection and exception by plaintiff.

MICHAEL GORMLEY, having been first duly sworn on the part of the defendants herein, was examined in chief by Mr. BURGESS, and testified as follows:

Q. You are one of the defendants in this suit?
A. Yes, sir.
Q. You know the plaintiff in this suit?
A. Yes.
Q. Mrs. Martin also?
A. Yes, sir; I know her.
Q. You are one of the persons to whom this deed was made which has been put in evidence and gave the notes?
A. Yes, sir.
Q. Do you know the land that is covered or described in that deed?
A. Yes, sir.
Q. How long have you known it?

A. Oh, 40 years, I suppose.
Q. What is the description of it—the kind of land?
A. It is wet, swamp land.
Q. Swamp land, is it?
A. Yes, sir.
Q. How much of it?
A. Well, of this whole quarter?
Q. Yes, the whole quarter.
A. Well, it is all, with the exception of 3 or 4 or 5 acres; something like that on the northeast corner.

Q. Is any part of it, except that part of it, fit for cultivation?
70 A. No, sir; except that; that would be if it was cleared up 3 or 4 acres.

Q. The rest of it, excepting this 4 or 5 acres, is what is called swamp land?
A. Swamp land.
Q. How much of the year is it in that condition?
A. Well, some years it is worse than others; it depends on the season. It is somewhat drier this season than it has been for quite awhile. It has been a dry season.
Q. How deep is the water standing on it?
A. Now?
Q. Yes, sir.
A. Oh, I don't know; some places there is considerable water and some places there is not any.
Q. The water, then, varies?
A. Yes, sir; it depends on how the rainy season is.
Q. That is, it varies as regards the seasons, and some places on it it is deeper than others?
A. Yes, sir.
Q. Is any part of it susceptible of cultivation?
A. No, sir; not except this that is in the corner there.
Q. What do you mean—that that is susceptible of cultivation? What can be done with it anyway? Can you plow it up and plant it, or simply mow it?
A. Well, if it was grubbed up and cleared up—there is some brush and trees on this corner—if that was cleared up you could turn it to uses, I suppose.
Q. That is susceptible of cultivation?
A. Yes, sir.
Q. But none of the rest of it is susceptible of cultivation?
A. No, sir.

71 Cross-examination by Judge BOOTH:

Q. Mr. Gormley, you live at Glencoe?
A. Yes, sir.
Q. You have lived there some time?
A. Well, I suppose 40 years and maybe upwards.
Q. You had lived there, then, a great many years at the time you made this purchase, had you not?
A. Yes, sir.

Q. This land adjoins Glencoe immediately on the west?
A. Yes, sir.
Q. You had been a member of the drainage commission, had you not?
A. Yes, sir.
Q. For a good many years at the time you made this purchase, is not that so?
A. Well, I suppose it was; yes, sir, I think it was.
Q. What did you buy this land for?
A. Well, I don't know as I can answer that.
Q. You had some object, hadn't you?
A. Well, I suppose we would try to get it drained some way.
Q. How?
A. I suppose the object would be, if it was drained, to turn it into——
Q. You really expected to have that land drained, so it would be valuable land, did you not?
A. Well, I don't know it would be valuable—to say very valuable—even if there was a drain on it.
Q. Well, you thought it was worth $40 an acre at the time you bought it, didn't you?
A. Yes, sir; I suppose so.
Q. Well, it was worth that for some things, wasn't it?
A. For some things.
72 Q. Yes; if it was worth it at all, it was worth it for some purpose?
A. Well, I don't know what purpose it would be worth it now.
Q. You didn't buy it for duck-shooting?
A. No, sir; I don't duck-shoot much.
Q. Nor craw-fish or anything of that——
A. No, sir.
Q. Now, is it not true that a considerable portion of that land is never really covered with water?
A. Well, there is but mighty little but what is covered at certain times of the year.
Q. That is in the winter or the early spring; is not that true of a great deal of the land around Chicago that at some times of the year it is covered with water; we have swamps all around here?
A. Yes; but it is not that way, though.
Q. Well, is it not true that this land is above the surface of the water a considerable portion of the year, and that the grass grows all over it?
A. Yes; it is so; and when you stand on it the sod will sink down 3 feet and the very minute you get off it will come right up again.
Q. Do you swear in walking over the sod will sink down 3 feet?
A. Yes, sir; some of it; the very moment you step off it it will come to the top again.
Q. Rises 3 feet again?
A. Well, let you clear down.
Q. There are very few persons whose legs are 3 feet long; you cut hay upon that, didn't you?

A. Oh, sometimes, yes.

Q. How many times did you cut hay there?

73 A. Probably cut hay there 4 or 5 times on it since it was bought.

Q. Since it was bought?

A. Yes, sir.

Q. 4 or 5 years?

A. Well, it may be sometimes; I have not been on it 2 years or 3 years in succession, and then maybe dry summer we can get a little something off it.

Q. When was the last time you cut hay on that property?

A. Well, I cut some this season.

Q. Upon what part of it?

A. Well, on this 40 acres—that is, upon the northeast 40 of that quarter section.

Q. Did you cut any upon any of the rest?

A. I do not think there was any that I cut anything on—on any of the rest.

Q. Don't think there was?

A. No, sir; I do not just exactly know.

Q. Mrs. Martin was hard up?

A. This was the way I understood it.

Q. And you thought you could buy the property cheap, and so you went with them to Mr. Culver's office?

A. Well, it may have been that I did; it may have been that I did go. I know Mrs. Martin staid at the house and so did Gertrude; it was very likely that they did; I would not swear that they did, and I would not swear that they did not.

Q. You knew the family, didn't you?

A. Oh, yes; I knew the father and all of them—the whole family.

Q. There was only 3 children—Mrs. Martin and Fred. and Gertrude?

A. Yes, sir.

Q. So they inherited whatever interest the father had?

74 A. Yes, sir.

Q. How did you come to buy this? Who made the first approaches—when you came to buy this who made the first approaches? Did these ladies come to you or did you go to them?

A. Well, I will tell you: Mrs. Martin came from Bay City—came over here to see her sister. I supposed she was hard up. That was the way I understood it. They came to my house and staid, both of them. I bought 2 blocks from them in another 40 acres, in section 17, where you heard Mr. Culver talk about, and after I bought those 2 blocks from Mary Ann Martin this woman over in Bay City wanted to get rid of her share or her other interest she had in this Skokie matter.

Q. This swamp, as you term it?

A. Yes, sir; swamp or Skokie. They call it that from the Indian name—they call it Skokie—and she staid there a couple of weeks or maybe more; maybe 3 weeks.

Defendants here rest.

And thereupon the plaintiff, to further maintain the issues on her part, introduced the following evidence:

Plaintiff offers in evidence a document from the Department of the Interior, General Land Office, being an exemplification of the application of Christopher Uthe to locate and the location of this quarter section, No. 37714.

M. L. 23554.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct. 18th*, 1882.

75 I, L. Harrison, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the application of Christopher F. Uthe to locate M. B. L. warrant No. 37714 for 160 acres, act of 1847, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] L. HARRISON,
Acting Commissioner of General Land Office.

Under act 11th February, 1847.

Land warrant No. 37714. Register and receiver's No. —.

LAND OFFICE, CHICAGO, ILL., *July 10th*, 1850.

We hereby certify that the attached military bounty land warrant No. 37714 was on this day received at this office from Christopher F. Uthe, of Cook county, State of Illinois.

ALFRED COWLES, *Register.*
JNO. H. KINZIE, *Receiver.*

I, Christopher F. Uthe, of Cook county, State of Illinois, hereby locate southeast quarter of section No. twelve, in township No. forty-two north, of range No. twelve east, in the district of lands subject to sale at the land office at Chicago, containing 160 acres, in satisfaction of the attached warrant numbered 37714.

Witness my hand this 10 day of July, A. D. 1850.

CHRISTOPHER F. UTHE.

ALFRED COWLES, *Register.*
JNO. H. KINZIE, *Receiver.*

76 LAND OFFICE, CHICAGO, ——, 1850.

We hereby certify that the above location is correct, being in accordance with law and instructions.

JNO. H. KINZIE, *Receiver.*
ALFRED COWLES, *Register.*

Land warrant certificate No. 37,714.

I, Christopher F. Uthe, being desirous of locating the southeast

quarter of section No. twelve, in township No. forty-two north, of range No. twelve east, in the district of lands subject to sale at the land office in Chicago, Illinois, with the attached military land warrant certificate No. 37,714, issued under the provisions of the ninth section of the act of Congress approved February 11, 1847, do solemnly swear that, from my knowledge of the fact, after actual inspection of the said tract of land on or about the eighth day of July, A. D. 1850, there was not at that time an actual settlement and cultivation upon any part of said land nor was there any person or persons residing upon it.

And I do verily believe that there is no actual settlement and cultivation or any person or persons residing upon any part of said land at this time.

CHRISTOPHER F. UTHE.

Subscribed and sworn to before me this 10th day of July, A. D. 1850.

ALFRED COWLES,
Register of Land Office.

I request my patent to be sent to ——.

Objected to by defendants because irrelevant, incompetent, and not admissible in evidence at common or statute law, and no proof of signature.

Objection overruled, and exception by defendants.

77 Plaintiff offers in evidence a certified copy of the will of Frederick Uthe, deceased:

In the name of God, amen. I, Frederick Uthe, of the town of New Trier, in the county of Cook and State of Illinois, and of the age of thirty-two years, and being of sound mind and memory, do make, publish, and declare this my last will and testament in the manner following—that is to say:

I give and bequeath to my sister, Gertrude Uthe, all my right, title, and interest in and to the southeast quarter of the southeast quarter of section seven, township forty-two north, range thirteen east, of third principal meridian, and also all my right, title, and interest in and to the southeast quarter of section twelve, township forty-two north, range twelve east, of third principal meridian, in Cook county and State of Illinois, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the premises above described to the said Gertrude Uthe, her heirs and assigns forever, it being understood that all my interest in and to the above-described property is a one-third interest.

And I further give and bequeath to my said sister, Gertrude Uthe, after paying all my lawful debts, all the rest, residue, and remainder of my goods and chattels and personal estate of every name and nature whatsoever, and I also hereby appoint her, my said sister, Gertrude Uthe, sole executrix of this my last will and testament, hereby revoking all former wills made by me, and I hereby exonerate her,

my said sister, Gertrude Uthe, from giving any bond in any court where this will is probated.

In witness whereof I have hereunto set my hand and seal this ninth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

78 FREDERICK UTHE. [SEAL.]

The above instrument, consisting of one sheet of legal cap, was, at the date thereof, signed, sealed, published, and declared by the said Frederick Uthe as for his last will and testament in presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto:

A. D. TAYLOR,
Residence in Chicago, 398 West Taylor street.

L. D. TAYLOR,
Residence, Glencoe.

MICHAEL GORMLEY,
Residence, Glencoe.

Proved in open court this 19th day of February, A. D. 1874.

M. R. M. WALLACE, *Co. Judge.*

Endorsed.

Will of Frederick Uthe, Deceased.

STATE OF ILLINOIS, } ss:
Cook County, }

In the County Court of Cook County.

Filed, proven, and admitted to probate this 19th day of February, A. D. 1874.

H. LEIB, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

I, Seth F. Hanchett, clerk of the probate court of Cook county, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the last will and testament of Frederick Uthe, deceased, which was proven and admitted to record in the county court of Cook county, Illinois, on the 19th day of February, 1874, all of which appears from the original on file and from the
79 records of said court in my office; and I further certify that I am by law the custodian of all the probate records and files of said county court.

In witness whereof I have hereunto set my hand and affixed the seal of said probate court, at my office, in the city of Chicago, in said county, this twenty-seventh day of January, A. D. 1880.

[SEAL.] SETH F. HANCHETT,
Clerk of the Probate Court.

Endorsement: Probate court of Cook county. In the matter of

the estate of Frederick Uthe, deceased. $1.00 paid. Seth F. Hanchett, clerk.

Objected to by defendants.

Objection overruled and exception by defendants.

Which was all the evidence offered or received on the trial of said cause.

And thereupon the court instructed the jury in behalf of the plaintiff as follows, to which defendants excepted:

Plaintiff's Instructions.

1. The jury are instructed that the burden of proof in this case is upon the defendants to show by their evidence that the lands in question or the greater part thereof were, on the 28th day of September, 1850, swamp and overflowed lands, made unfit thereby for cultivation, and that the said lands at the date aforesaid had not been sold by the United States; and if the defendants have failed to prove these facts by the evidence the verdict should be for the plaintiff, and the jury, if from the evidence they so find for the
80 plaintiff, should assess damages in her favor to the amount of the aggregate of the principal and interest which they shall find to be due and unpaid on the notes given in evidence by the plaintiff. Given.

Endorsement: 122. Uthe *vs.* Culver. Plaintiff's instructions given. Filed September 19th, 1884. Jacob Gross, clerk.

And the court instructed the jury in behalf of the defendants as follows:

1. The jury are instructed that if they believe from the evidence that the notes offered in evidence by the plaintiff were given in payment by the defendants to the plaintiff for the S. E. ¼ of section 12, township 42 N., R. 12 E., Cook county, Illinois, or any part thereof, and that the plaintiff and one Mary Ann Martin, the grantors in the deed therefor (offered in evidence by the defendants) were not seized in fee simple to said lands or any part thereof at the time of giving said deed or at any time prior to August 2, 1878, when this suit was begun, and that the defendants have offered to reconvey to plaintiff the said land first mentioned to the plaintiff and are in a condition to do so, then the jury will find for the defendants; and if the jury further believe that the said Gertrude Uthe has received moneys thereon from the defendants they will find the issues for the defendants and will assess defendants' damages at whatever sum the jury find from the evidence the defendants have so paid the plaintiff Uthe. Given.

For defendants:

2. If the jury find for the defendants on the issues of this case, then they are entitled to recover from the plaintiff such
81 sums of money as they may have proved before the jury to have paid her on account of the purchase of said lands in question, and interest thereon from the payment at the rate of six per cent. per annum from time it was paid. Given.

3. And refused to instruct the jury in behalf of the defendants, as requested, as follows:

The jury are instructed for the defendants that the introduction of the patent is *prima facie* that no patent prior to its date had been issued by the United States for the land described in that patent. Refused.

The jury are instructed in behalf of the defendants:

4. That if they believe from the evidence that the notes offered in evidence by the plaintiff were given by the defendants as part purchase of the S. E. ¼ of section 12, T. 42 N., R. 12 E., as shown by the warranty deed of conveyance therefor offered in evidence by the defendants; and if the jury further find that said lands, or the greater part of each of the 40-acre tracts therein included, were, on the 28th day of September, 1850, swamp lands, overflowed and made thereby unfit for cultivation, then the jury are instructed that on the 28th day of September, 1850, said lands became the property of the State of Illinois unless the United States had made a previous grant thereof, and the plaintiff cannot recover unless she shows that she or Mary Ann Martin or both of them acquired title as grantee or remote grantee through a grant made by the United States of America prior to said 28th day of September, 1850, or as grantee or remote grantee by grant from the State of Illinois subsequent to the 28th day of September, 1850, and prior to the commencement of this suit, to wit, the 2d day of August, 1878. Refused.

5. The jury are instructed on behalf of the defendants that if they believe from the evidence that the notes offered in evidence
82 by the plaintiff were given by the defendants in payment to the plaintiff for S. E. ¼ of sec. 12, T. 42 N., R. 12 E., or any part thereof, and for no other consideration, then the plaintiff, to maintain her action, must show that she or Mary Ann Martin or both of them, the grantors in the deed offered in evidence by the defendants, had, prior to the commencement of this suit, to wit, the 2d of August, 1878, a good and perfect title to said 160 acres of land or such part thereof so sold, either as grantee or remote grantee under a grant from the United States of America prior to the 28th day of September, 1850, or as grantee or remote grantee from the State of Illinois by grant subsequent to said 28th day of September, 1850, provided the jury find from the evidence that said land or said part thereof, on said 28th day of September, 1850, were swamp lands and overflowed and made thereby unfit for cultivation. Refused. Burden of proof not on the pl'ff.

6. The jury are further instructed that it is not necessary for the defendants in order to make out their defense to show that they have tendered a reconveyance of the land the consideration for the notes in question, if the jury find under the instructions given them that the defendants, upon the facts proved, are otherwise entitled to a verdict in their favor. Refused.

For defendants:

7. The jury are instructed that until the patent is duly issued according to law the Government has not sold the land belonging to it, and that an application under a land warrant for a piece of

land is not a sale of it until the patent is issued on that application to the party applying for it. Refused. Misleading, as the evidence tends to show that land was located before passage of act of 1850.

To which defendants excepted.

And thereupon the jury found a verdict for the plaintiff for $7,039; to which defendants excepted and moved the court to set aside the verdict and to grant a new trial, and filed the
83 reasons therefor and affidavits as follows:

STATE OF ILLINOIS, }
County of Cook. }

In the Circuit Court of Cook County.

Motion for New Trial.

GERTRUDE UTHE
vs.
MICHAEL GORMLEY and MORTON CULVER. } 39318.

And now come the defendants and move the court to set aside the verdict of the jury and to grant a new trial, and assign therefor the following reasons:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to the law.
3. The court admitted evidence on the part of plaintiff and against the objections of these defendants which was improper, incompetent, irrelevant, and inadmissible.
4. The court erred in refusing to admit evidence on the part of the defendants which was proper, competent, and relevant.
5. The verdict ought to have been in favor of the defendants.
6. The court erred in refusing to instruct the jury as requested by the defendants.
7. The court erred in refusing to instruct the jury in relation to a statute of the United States (offered in evidence) as the same has been construed by the Supreme Court of the United States.
8. The court erred in instructing the jury as requested by the plaintiff.
9. The court erred in making oral remarks in the presence and hearing of the jury and during the trial of said cause, in
84 this, to wit, in saying that the decision of the supreme court of Illinois in the case of Keller *vs.* Brickey, as reported in the 78 Illinois Reports, page 133, and of the United States Supreme Court in the case of Railroad *vs.* Smith, as reported in IX Wallace, on page 96, were all wrong, or words to that effect, and that he had no doubt these courts would reverse such decisions, thereby unlawfully prejudicing defendants' cause before such jury.
10. Because the verdict is excessive.
11. The verdict is contrary to law and the weight of evidence before the jury.

MORTON CULVER,
Att'y for Defendants.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

GERTRUDE UTHE } 39,318.
vs. } In Support of Motion
MICHAEL GORMLEY and MORTON CULVER. } for New Trial.

Michael Gormley, on oath, says he is one of the defendants in the above-entitled cause, and that he was present during the trial of said cause before his hon. Judge Hawes; that during the trial of said cause and in the presence and hearing of the jury Judge Hawes asked the attorney, W. T. Burgess, who was conducting the trial on behalf of the defendants, what his defence was, and Burgess said that under the swamp land act of September 28, 1850, the title to the lands in controversy passed on that day to the State of Illinois, and that the United States had no title to grant when patent was issued to Christopher F. Uthe, and that the supreme court of Illinois had
85 so construed that act in the case of Keller *vs.* Brickey, 78 Ill., 133, and that the Supreme Court of the United States had also construed that act in the same way in the case of Railroad *vs.* Smith, IX Wallace, page 96, and thereupon Burgess handed the court the decisions referred to, and the court looked at them and then and there remarked orally, in the hearing and presence of the jury and during the trial of said cause and before the jury had retired to consider of their verdict, "Those decisions are all wrong and I've no doubt those courts will reconsider those decisions. Why, what would become of the swamp lands down at Calumet?" or words to that effect, and affiant says he believes that said remarks by the court unduly prejudiced the minds of the jury against defendants and against the due consideration of the defence offered on said trial before said jury on such trial.

MICHAEL GORMLEY.

Subscribed and sworn to before me this 25 day of November, 1884.
[NOTARIAL SEAL.] GUSTAVUS ANDERSON,
Notary Public.

Morton Culver, on oath, says he is a defendant in the above-entitled cause; that he was present at the trial of said cause; that he has read the foregoing affidavit of Michael Gormley, and he says that the matters and things therein set forth are true of his own knowledge.

MORTON CULVER.

Subscribed and sworn to before me November 24, 1884.
[NOTARIAL SEAL.] GUSTAVUS ANDERSON.
Notary Public.

But the court overruled the motion and entered judgment
86 on the said verdict; to which defendants excepted; and because the matter and things above set forth do not fully appear of

record the defendants present this their bill of exceptions to be signed and sealed according to law, which is accordingly done.

KIRK HAWES. [SEAL.]
Presiding Judge of the Circuit Court of Cook County.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common-law side thereof, between Gertrude Uthe, plaintiff, and Michael Gormley *et al.*, defendants.

In witness whereof I have hereunto set my hand
[COURT SEAL.] and affixed the seal of said court, at Chicago, in said county, this third day of March, 1885.

HENRY BEST, *Clerk.*

In the Appellate Court, First District of Illinois. March Term, 1885.

GORMLEY *et al.* }
vs. } Error to Circuit Court of Cook County.
UTHE. }

And now comes the plaintiffs in error and pray this court to reverse the judgment of the court below, and assign as reasons therefor the following:

87 *Errors.*

1. The judgment is contrary to law.
2. The judgment is contrary to the evidence.
3. The court erred in allowing the plaintiff (def't in error) to introduce testimony and evidence which was improper, incompetent, and irrelevant over the objections of the defendants (plaintiffs in error).
4. The court erred in excluding proper, competent, and relevant testimony and offers by the defendants.
5. The court erred in refusing to set aside the verdict of the jury and granting a new trial.
6. The court erred in instructing the jury in behalf of the plaintiff.
7. The court erred in refusing to instruct the jury as requested by defendants.
8. The court erred in his conduct in making oral remarks prejudicial to defendants in presence of the jury.
9. The court erred in refusing to instruct the jury on a statute of the United States, as the same is and has been construed by the Supreme Court of the United States of America.
10. The judgment is excessive, greater than the *ad damnum* in plaintiff's declaration.
11. The judgment ought to have been for the defendants.

12. Errors on the face of the record.

13. The appellate court erred in affirming the judgment of the circuit court.

MORTON CULVER,
Att'y for Plaintiffs in Error.

88 In the Appellate Court, First District, Illinois.

MICHAEL GORMLEY *et al.*
vs.
GERTRUDE UTHE. } 2020. Error, Cook Circuit.

I, John J. Healy, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked "A" is the original transcript of record filed in said appellate court on the 3d day of March, A. D. 1885, by said Morton Culver.

In testimony whereof I have hereunto set my hand
[COURT SEAL.] and seal of said court, at Chicago, this 21st day of August, A. D. 1885.

JNO. J. HEALY,
Clerk of the Appellate Court, First District, Illinois.

(Endorsed:) "Filed Sep. 2, 1885. A. H. Taylor, clerk."

89 Be it remembered that afterwards, to wit, on the said 2nd day of September, A. D. 1885, there was filed in the office of the clerk of the said supreme court a certain transcript of the record and proceedings of the appellate court of Illinois, first district, in words and figures following, viz:

At a term of the appellate court, begun and held, at Chicago, on Tuesday, the third day of March, in the year of our Lord one thousand eight hundred and eighty-five, within and for the first district of the State of Illinois.

Present: Hon. Isaac G. Wilson, presiding justice; Joseph M. Bailey, justice; Wm. K. McAllister, justice; John J. Healy, clerk; Seth F. Hanchett, sheriff.

MICHAEL GORMLEY *et al.*
vs.
GERTRUDE UTHE.. } No. 2020. Error, Cook Circuit.

Be it remembered that heretofore, to wit, on the 25th day of November, A. D. 1884, the following præcipe for writ of error was filed in said cause; which is in words and figures following, to wit:

In the Appellate Court, First District.

MICHAEL GORMLEY and MORTON CULVER
vs.
GERTRUDE UTHE. } Error to the Circuit Court of Cook County.

90 The clerk will please issue a writ of error to the clerk of said circuit court and also a summons to the sheriff — county

commanding him to summon Gertrude Uthe to the March term, 1885, of said court.

MORTON CULVER,
Att'y for Plaintiffs in Error.

And thereupon, on the 25th day of November, A. D. 1884, the following writ was issued in said cause; which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Appellate Court, }

The People of the State of Illinois to the sheriff of Cook county, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Cook county, before the judge thereof, between Gertrude Uthe, plaintiff, and Michael Gormley and Morton Culver, defendants, it is said manifest error hath intervened, to the injury of the said Michael Gormley and Morton Culver, as we are informed by his complaint—

The record and proceedings of which said judgment we have caused to be brought into our appellate court of the first district, State of Illinois, at Chicago, before the justice thereof, to correct the errors in the same in due form and manner according to law:

Therefore we command you that, by good and lawful men of your county, you give notice to the said Gertrude Uthe that she be and appear before the justice of our said appellate court at the next term of said court, to be holden at Chicago, in said State, on the first Tuesday in March, A. D. 1885, to hear the record and pro-
91 ceedings aforesaid and the errors assigned, if she shall see fit; and, further, to do and receive what said court shall order in this behalf, and have you then and there the names of those by whom you shall give the said Gertrude Uthe notice, together with this writ.

Witness Hon. Isaac G. Wilson, presiding justice of our said court, and the seal thereof, at Chicago, this 25th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

ELI SMITH,
Clerk of the Appellate Court of the First District.

Po. 10. The within-named defendant not found in my county this 3d day of March, 1885.

SETH F. HANCHETT, *Sheriff,*
By C. R. MATSON, *Deputy.*

[Endorsed:] Appellate court, first district, Illinois. Filed March 3, 1885. Jno. J. Healy, cl'k.

And thereupon, on the 26th day of December, A. D. 1884, the following affidavit was filed in said cause; which is in words and figures following, to wit:

In the Appellate Court for the First District of Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

MICHAEL GORMLEY and MORTON CULVER } Error to the Circuit Court
vs. } of Cook County.
GERTRUDE UTHE. }

92 Morton Culver, one of the said plaintiffs in error, on oath says that Gertrude Uthe, said defendant in error, has gone out of the State of Illinois, so that service of process cannot be had upon her; that her present place of residence, as affiant is informed, is at Atchison, in the State of Kansas; that she was represented in said superior court by Messrs. Booth and Booth and by W. H. Condon, all of whom, as affiant is informed and believes, reside in the city in [of] Chicago, in said county of Cook and State of Illinois; that said Booth & Booth have their office at No. 86 Washington street, and said Condon at corner of Franklin and South Water streets, in said city of Chicago.

MORTON CULVER.

Subscribed and sworn to before me the 26th day of December, 1884.

[SEAL.] GUSTAVUS ANDERSON,
Notary Public.

And thereupon, on the same day, to wit, December 26th, A. D. 1884, the following publication notice was issued in said cause; which notice is in words and figures following, to wit:

STATE OF ILLINOIS:

Appellate Court within and for the First District of said State.

MICHAEL GORMLEY and MORTON CULVER } No. 2020. Error to Cook
vs. } Circuit.
GERTRUDE UTHE. }

Whereas the said Michael Gormley and Morton Culver have sued out a writ of error from said appellate court to reverse a judgment obtained by said Gertrude Uthe against said Michael Gormley and Morton Culver in the said circuit court of Cook county, which
93 said writ of error is now pending in said appellate court; and whereas a writ of *scire facias* has been duly issued herein, returnable on the first day of the next term of said appellate court, to be holden at Chicago, in said State, on the first Tuesday of March next, according to law;

And whereas also it appears by affidavit on file in the clerk's office of said appellate court that the said Gertrude Uthe is a non-resident of the State of Illinois and without the reach of the process of said appellate court:

Now, therefore, you, the said Gertrude Uthe, the said defendant in error, whose non-residence appears as aforesaid, are hereby notified

to be and appear before the justice of said appellate court at the next term of said court to be holden at Chicago, in said State, on the first Tuesday in March next to hear the record and proceedings brought into said appellate court on return of said writ of error and the errors assigned if you shall see fit, and further to do and receive what said court shall order in this behalf.

Dated this December 26th, A. D. 1884.

JNO. J. HEALY,
Clerk of the Appellate Court of the First District.

Certificate of Publication.

This — to certify that the notice of writ of error, a true copy of which is hereto annexed, was published in the Legal Adviser, a secular newspaper of general circulation published weekly in the city of Chicago, Cook county and State of Illinois, by the Law Publishing Company, a corporation existing under the laws of the State of Illinois, 4 times for 4 weeks successively; that the date of the
94 first publication was the 30th day of December, A. D. 1884, and the date of the last publication was the 20th day of January, A. D. 1885, said paper being specially authorized by law as the proper medium for the publication of legal notices of said county by virtue of an act entitled "An act to incorporate the Franklin Printing and Publishing Company," approved March 1, 1867, the name of which corporation has been duly changed to "The Law Publishing Company," approved March 1, 1867, *the name of which corporation has been changed to "The Law Publishing Company."*

In testimony whereof the Law Publishing Company have caused this certificate to be signed by its president and secretary and the corporate seal thereof to be affixed this 20th day of Jan. A. D. 1885.

E. M. HAINES, *President.*

[SEAL.] S. I. BRADBURY, *Secretary.*

Fees, $8.50; received payment.

STATE OF ILLINOIS, } ss:
First District, }

I, John J. Healy, clerk of the appellate court of the first district of Illinois, hereby certify that on the 31st day of December, A. D. 1884, being within ten days after the first publication of the within notice, I sent by mail a copy of said notice to the defendants named therein, as follows:

One to Miss Gertrude Uthe, at Atchison, Kansas.

One to Mess. Booth & Booth, at Chicago, Ill.

One to W. H. Condon, at Chicago, Ills.

Witness my hand and the seal of said court this 31st day of December, A. D. 1884.

JNO. J. HEALY, *Clerk.*

95 And thereupon, on the 17th day of March, A. D. 1885, the following proceedings were had and entered of record in said cause, to wit:

MICHAEL GORMLEY *et al.*
vs.
GERTRUDE UTHE. } 2020. Error, Cook Circuit.

This day came defendant in error, by her counsel, and moved the court for leave to file a remittitur by which she remits from the judgment of the circuit court of Cook county in said cause the sum of thirty-nine dollars, and the court, being fully advised in the premises, doth order that said motion be allowed.

And thereupon, on the 29th day of May, A. D. 1885, the following order of affirmance was made and entered of record in said cause, to wit:

MICHAEL GORMLEY and MORTON CULVER
vs.
GERTRUDE UTHE. } 2020. Error, Cook Circuit.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand
96 in full force and effect, notwithstanding the said matters and things therein assigned for error, and it is further considered by the court that the said Gertrude Uthe, defendant in error, recover of and from the said Michael Gormley and Morton Culver, plaintiffs in error, her costs by her in this behalf expended, to be taxed, and that she have execution therefor.

And thereupon, on the 13th day of June, A. D. 1885, the following proceedings were had in said cause; which are in words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County,

In the Appellate Court of Cook County, First Dist. March Term, A. D. 1885.

MICHAEL GORMLEY and MORTON CULVER
vs.
GERTRUDE UTHE. } Writ of Error.

To Booth & Booth and W. H. Condon, attorneys for def't in error:

You are hereby notified that I shall apply for a rehearing of said

cause in said appellate court in accordance with the rules of said court.

MORTON CULVER,
Attorney for Plaintiff in Error.

Chicago, June 13th, A. D. 1885.

We hereby accept service of the above notice this 13th day of June, A. D. 1885.

BOOTH AND BOOTH,
Att'ys for Def't in Error.

97 STATE OF ILLINOIS, } ss:
Cook County, }

Harry N. Culver, being first duly sworn, deposes and says that he served the within notice by leaving a copy of the same with said Condon, by leaving a copy thereof in his office on the 13th day of June, 1885.

HARRY N. CULVER.

Subscribed and sworn to before me this 13th day of June, A. D. 1885.

[SEAL.] GUSTAVUS ANDERSON,
Notary Public.

I, John J. Healy, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final orders, affidavits, notices, &c., of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed [COURT SEAL.] the seal of the said appellate court, at Chicago, this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-five.

JNO. J. HEALY,
Clerk of the Appellate Court of the First District.

STATE OF ILLINOIS, }
Northern Grand Division. }

In the Supreme Court. September Term, 1885.

98 MICHAEL GORMLEY and MORTON CULVER *vs.* GERTRUDE UTHE. } Error to the Appellate Court, First District of Illinois.

And now come the plaintiffs in error, by their attorney, Morton Culver, and pray this court to reverse the judgment of the circuit court of Cook county and of the appellate court for the first district of Illinois, and as reasons therefor assign the following errors:

1. The judgment is contrary to law.
2. The judgment is contrary to the evidence.
3. The court erred in allowing the plaintiff (defendant in error) to

introduce testimony and evidence which was improper and irrelevant and against the objections of the defendants (plaintiffs in error).

4. The court erred in excluding proper, competent, and relevant testimony and offers by the defendants.

5. The court erred in refusing to set aside the verdict of the jury and granting a new trial.

6. The court erred in instructing the jury in behalf of the plaintiff.

7. The court erred in refusing to instruct the jury as requested by defendants.

8. The court erred in his conduct in making oral remarks prejudicial to defendants in presence of the jury.

9. The court erred in refusing to instruct the jury on a statute of the United States as the same is and has been construed by the Supreme Court of the United States of America, to wit, an act of September 28th, 1850, found in the IXth vol. of the Statutes at Large, page 519, and herein set forth at length.

10. The judgment is excessive and greater than the *ad*
99 *damnum* in plaintiff's narr.

11. The judgment and verdict ought to have been for the defendants, Gormley and Culver.

12. Errors on the face of the record.

13. The appellate court erred in affirming the judgment of the circuit court.

MORTON CULVER,
Att'y for Plaintiffs in Error.

Endorsed: Filed Sept. 2, 1885. A. H. Taylor, clerk.

100 STATE OF ILLINOIS, *ss:*

I, Alfred H. Taylor, clerk of the supreme court for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of a certified transcript of the record and proceedings of the superior court of Cook county and also of the appellate court of Illinois, first district, in a certain cause entitled in this court Michael Gormley and Morton Culver *vs.* Gertrude Uthe, which transcripts aforesaid were filed in this office on the 2nd day of September, A. D. 1885.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this 22d day of September, A. D. 1886.

A. H. TAYLOR, *Clerk.*

100½ And afterwards, to wit, on the 5th day of September, A. D. 1885, the same being one of the days of said term, certain proceedings were had and orders made and entered of record by said court, among which is the following, viz:

MICHAEL GORMLEY
vs.
GERTRUDE UTHE. } 46. Error to 1st District.

Now, on this day, this cause is, by order of court, continued for service.

And afterwards, to wit, on the 5th day of October, A. D. 1885, the said defendant in error entered her appearance in said cause in writing in the words and figures following:

STATE OF ILLINOIS,
Northern Grand Division, } *ss:*

In the Supreme Court.

MICHAEL GORMLEY and MORTON CULVER, Pl'ffs in Error,
vs.
GERTRUDE UTHE, Def't in Error. } Error to Cook Co. Circuit Court.

We hereby enter the appearance of the defendant in error in the above-entitled cause.

WM. H. CONDON,
BOOTH & BOOTH,
Att'ys for Def't in Error.

101 At a supreme court, begun and held, at Ottawa, on Tuesday, the second day of March, in the year of our Lord one thousand eight hundred and eighty-six, within and for the northern grand division of the State of Illinois.

Present: John H. Mulkey, chief justice; John M. Scott, justice; John Scholfield, justice; Simon P. Shope, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; George Hunt, attorney general; William R. Milligan, sheriff; Alfred H. Taylor, clerk.

Be it remembered, to wit, on the 4th day of March, A. D. 1886, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

MICHAEL GORMLEY *et al.*
vs.
GERTRUDE UTHE. } Gen. No. 1310. 11. Error to First District.

Now, on this day, this cause comes on for hearing in the regular call of the docket, and it appearing to the court that defendant in error hath duly entered their [her] appearance herein and that a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, have been duly filed as required by law and the rules of this court in that behalf made and provided, and that this cause is here submitted upon such

transcript, abstracts, briefs, and arguments for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

102 State of Illinois Supreme Court, Northern Grand Division.

At a supreme court, begun and held, at Ottawa, on Tuesday, the 2d day of March, in the year of our Lord one thousand eight hundred and eighty-six, within and for the northern grand division of the State of Illinois.

Present: John H. Mulkey, chief justice; John M. Scott, justice; John Scholfield, justice; Simeon P. Shope, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; Benj. D. Magruder, justice; George Hunt, attorney general; William R. Milligan, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the 15th day of May, A. D. 1886, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

MICHAEL GORMLEY *et al.* *vs.* GERTRUDE UTHE. } No. 11. Error to 1st District. Appeal from —.

103 *Opinion by Mulkey, J.*

Gertrude Uthe, the defendant in error, recovered a judgment in the circuit court of Cook county against Michael Gormley and Morton Culver, plaintiffs in error, for $7,039. A remittitur of $39 was subsequently entered reducing the judgment to $7,000, which was affirmed on error by the appellate court for the first district. The action below was assumpsit, the plaintiff counting upon eleven promissory notes given by the defendants to the plaintiff for a certain quarter section of land near Chicago which the plaintiff conveyed to them with the usual covenants of warranty. To the declaration, which was in the usual form, the defendants plead, 1st, non-assumpsit; 2, total failure of consideration; 3d, set-off.

Issues of fact were joined on these pleas and tried before the court and a jury with the result stated. The lower courts to reach the conclusion they did must have found that the defendant made the notes, as charged in the declaration; that there was no failure of the consideration "for which they were given, and also that the plaintiff was not indebted to the defendants by way of set-off. So far, therefore, as the case depends upon these findings of the lower courts, plaintiffs in error clearly can have no relief here. The controlling question in the trial court was whether the title to the land in question was in the defendant at the time of her conveyance to plaintiffs in error.

The plaintiff on the trial made out a *prima facie* case by putting in evidence the eleven notes sued on, and thereupon rested. The defendants then proved the notes were given to secure the purchase-money for the quarter section of land in question, and that con-

temporaneously with their execution and as a part of the same transaction the plaintiff conveyed the land to the defendants
104 by general warranty deed. It was further shown that said land is swamp land and was so on the 28th of September, 1850, when the act of Congress granting [granted] the unsold swamp and overflowed lands to the State. The act itself was also put in evidence, together with an exemplified copy of the patent from the United States for the land issued on the 10 Feb., 1851, to Christopher F. Uthe, the father of the plaintiff, and through whom she derives title.

The defendants then rested.

Upon this showing, grant to the State being anterior to the issuing of the patent, the title to the land appeared to be in the State. To meet the *prima facie* defense thus made, the plaintiff then proved, by an exemplified copy of so much of the records of the Land Office as relates to the location of military bounty land warrant No. 37714, that the same was on the 10th day of July, 1850, duly located by the said Christopher F. Uthe on said quarter section of land in pursuance of which the patent of the 10th of Feb., 1851, was issued to him as above shown.

This being all the evidence, the court, on the trial, refused to instruct the jury, at the instance of the defendants, that if they found the facts as above set forth the law was with the defendants, and that they should find accordingly. The ruling of the court in this respect presents the only question necessary to be considered. As the grant by Congress extends to all swamp and overflowed lands in the State remaining "unsold" at the time of the passage of the act, it is contended by plaintiffs in error that, notwithstanding, the location of the warrant by Uthe upon the land the title thereto nevertheless passed to the State under the grant, and that therefore Uthe took nothing by his patent. This contention is founded upon the technical doctrine that where land or other property is
105 bargained and disposed of for a consideration other than money the transaction in contemplation of law is not a sale, but a mere barter or exchange. This we concede to be the general doctrine on the subject. But it does not necessarily follow that in construing the word "sale" or "sold" where it occurs in a statute that it may not be used in a different sense or have a more extended meaning. In giving a construction to words in a statute many things are to be kept in view, such as the object or purposes of the act, the connection in which they are used, and the consequences that will probably result from the proposed construction. Influenced by these considerations, the same word may mean one thing in one statute and a different thing in another. In one enactment the ordinary meaning of a word may be enlarged; in another contracted. In the present case we do not think the word "sold" occurring in the first section of the act in question is used in its strictly technical sense as claimed, but in a more extended sense of the term, so as to exclude from the operation of the grant all lands which the United States had by any valid agreement already disposed of at the time

the act took effect, whether technically a sale or not. The location of the warrant was authorized by law, and when made was a valid act mutually binding upon the Government as well as the party making it.

It is unreasonable to suppose, therefore, that Congress in making the grant of swamp lands to the State could have intended, even conceding it had the power to do so, to defeat and abrogate by mere legislative enactment all entries of land by military bounty warrants for which patents had not been issued at the time of the passage of the act. But if counsel for plaintiffs in error is correct in his reasoning it is not readily perceived how the issuing of a patent would have helped the matter, for the mere issuing of the patent could not have changed the character of the consideration
106 paid for the land, and according to the technical common-law rule there can be no sale in any case where the consideration is anything other than money. The case of The States of Iowa and Illinois, petitioners, *v.* McFarland, 110 U. S., pg. 471 *et seq.*, cited by counsel, we do not regard as in conflict with the view here taken. The court in that case construed the word "sale" as it occurred in the statute then under consideration according to its strict technical signification, and we fully concur in the conclusion reached. The context and presumed intention of Congress under all the circumstances we think demanded that construction. That case, so far from being in conflict with the view here taken, well illustrates what we have said in this.

It is also objected that the court erred in admitting in evidence the exemplified copy of the Land Office record showing the location of the land warrant in question. There is no force in this objection. 1 Greenleaf's Ev., sec. 485.

It follows from what we have said the defense in the case was not made out, and the judgment will therefore be affirmed.

107 Be it remembered, to wit, on the 15th day of May, A. D. 1886, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

MICHAEL GORMLEY and MORTON CULVER *vs.* GERTRUDE UTHE. } No. 1310. Error to Appellate Court of Illinois, First District.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error: Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the

said defendant in error recover of and from the said plaintiffs in error her costs by her in this behalf expended, and that she have execution therefor.

108 In the Supreme Court of Illinois, Northern Grand Division.

To the honorable chief justice of the supreme court of the State of Illinois:

And now come Morton Culver and Michael Gormley, by their attorney, Morton Culver, and complain that in the records and proceedings and also in the rendition of a judgment in a suit between the said Morton Culver and Michael Gormley, plaintiffs in error, and Gertrude Uthe, defendant in error, in the supreme court of the State of Illinois, being the highest court of law and equity in the said State in which a decision could be had in said suit, and in which a final judgment was rendered against them, the said Culver and Gormley, on the 15th day of May, A. D. 1886, in said suit, wherein were drawn in question the construction of two certain statutes of the United States, to wit, one concerning "swamp lands," approved 28 September, 1850 (14 Statutes at Large, page 519), and the other concerning "authentication of records" (§§ 905 and 906, U. S. Revised Statutes, 1873–'4, title 13, chap. 17), and the decision was against the title, right, privilege, and exemption specially set up and claimed under such statutes; all of which appears *appears* in the records and proceedings in said suit, as well also as the fact that the judgment, exclusive of costs and interest, exceeds the sum of five thousand dollars, manifest error hath happened, to the
109 great damage of the said Culver and Gormley. Wherefore they, the said Culver and Gormley, pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

MORTON CULVER,
Attorney for Plaintiffs in Error.

In the Supreme Court of Illinois.

The foregoing petition having been by me examined, as well as the record of said suit, and the said Culver and Gormley having presented their bond in the penal sum of five hundred dollars, which said bond is approved, the writ of error to the Supreme Court of the United States is allowed as prayed for.

JOHN M. SCOTT, [SEAL.]
Chief Justice of the Supreme Court of the State of Illinois.

109½ [Endorsed:] Supreme court of Ills. Gormley *et al. vs.* Uthe. Petition — allowance of writ of error to the United States Supreme Court. Filed Sep. 10, 1886. A. H. Taylor, clerk.

110 Be it remembered that, to wit, on the 10th day of September, 1886, there was filed in the office of the clerk of said supreme court a certain bond, in words and figures following, viz:

Know all men by these presents that we, Morton Culver and Michael Gormley, as principals, and Gustavus Anderson and Maurice

R. Bortree, as sureties, all of the county of Cook and State of Illinois, are held and firmly bound unto Gertrude Uthe in the penal sum of five hundred dollars, to be paid to the said Gertrude Uthe, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the ninth day of September, 1886.

Whereas the above-bounden Morton Culver and Michael Gormley have been allowed to prosecute a writ of error to the Supreme Court of the United States of America by the chief justice of the supreme court of the State of Illinois, to have said Supreme Court of the said United States review a certain judgment rendered by the said supreme court of Illinois on the 15th day of May, 1886, in favor of said Gertrude Uthe, defendant in error, and against the said Culver and Gormley, plaintiffs in error:

Now, therefore, the condition of the above obligation is such that if the above-named Morton Culver and Michael Gormley shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MORTON CULVER. [SEAL.]
MICHAEL GORMLEY. [SEAL.]
MAURICE R. BORTREE. [SEAL.]
GUSTAVUS ANDERSON. [SEAL.]

Witness: —— ——.

111 STATE OF ILLINOIS, }
County of Cook. }

Gustavus Anderson and Maurice R. Bortree, being duly sworn, depose and say and each for himself saith that he is worth the sum of two thousand dollars over and above all his just debts, liabilities, and exemptions, and that the signatures to the foregoing bond by them as sureties are their genuine signatures.

MAURICE R. BORTREE.
GUSTAVUS ANDERSON.

[SEAL.] Subscribed and sworn to before me this 9th day of September, 1886.

LAWRENCE NELSON,
Notary Public.

I approve the above bond and the sufficiency of the sureties thereto.

JOHN M. SCOTT,
Chief Justice of the Supreme Court of Illinois.

112 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the supreme court of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is before you in said supreme court, between Morton Culver and Michael Gormley, plaintiffs in error, and Gertrude Uthe, defendant in error, in an action of law, a manifest error hath happened, to the great damage of the said Morton Culver and Michael Gormley, plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
Clerk of the United States Circuit Court for the Northern District of Illinois.

Allowed by—
HON. JOHN M. SCOTT,
Chief Justice of the Supreme Court of the State of Illinois.

113 [Endorsed:] Supreme Court of the United States. Morton Culver and Michael Gormley, plaintiffs in error, *vs.* Gertrude Uthe, defendant in error. Writ of error. Copy deposited for the defendants in error in the clerk's office supreme court of Illinois. Fees for this transcript, $67.50; paid by the plaintiffs in error.

UNITED STATES OF AMERICA, } ss:
State of Illinois, Northern Grand Division, }

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division of said State of Illinois and keeper of the records and seal thereof, do certify and return to the said annexed

writ of error that the certified copy of the record and proceedings in said supreme court of Illinois, hereunto annexed, is a full, true, and correct copy of all the record and proceedings in said supreme court of Illinois, including a full, true, and complete copy of the opinion of said supreme court of Illinois in the said cause wherein Morton Culver and Michael Gormley were plaintiffs in error and Gertrude Uthe was defendant in error, wherein judgment was rendered by said supreme court of Illinois against said plaintiffs in error on the fifteenth day of May, A. D. 1886, as the same appears of record in my said office, together with said writ of error and the order allowing the same and a copy of the bond given by said plaintiffs in error in that behalf, the original of said bond remaining on file in the office of the clerk of said court.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of the supreme court of Illinois, at Ottawa, in the said northern grand division, this twenty-second day of September, A. D. 1886.

A. H. TAYLOR,
Clerk of the Supreme Court of Illinois, Northern Grand Division.

114 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court, to the October Term, 1886.

MORTON CULVER and MICHAEL GORMLEY, Plaintiffs in Error,
vs.
GERTRUDE UTHE, Defendant in Error.
} Error to the Supreme Court of Illinois (Northern Grand Division.)

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said plaintiffs in error, Morton Culver and Michael Gormley, by Morton Culver, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

I.

The said supreme court of Illinois erred in the construction and interpretation of a certain statute of the United States of America concerning swamp lands, approved the 28th day of September, A. D. 1850, and found in IX Statutes at Large, page 519.

II.

115 The said supreme court of Illinois erred in the construction and interpretation of a certain statute of the United States of America concerning authentication of records, and found in the U. S. Revised Statutes of 1873–'4, as §§ 905 and 906.

III.

The supreme court of Illinois erred in admitting in evidence a

certain copy of a pretended location of lands under a military bounty warrant, not properly authenticated and contrary—

(*a*) To said U. S. of America statute concerning the "authentication of records" aforesaid.

(*b*) Contrary to the statutes of Illinois concerning "evidence and depositions," and found in "Hurd's Revised Statutes of Illinois, 1874," on page 491, § 20; and

(*c*) Contrary to the common-law rules of evidence.

IV.

The judgment ought to have been against the said defendant in error.

V.

The judgment ought to have been in favor of plaintiffs in error to the amount of set-off proven by them.

116 Wherefore the said plaintiffs in error, Morton Culver and Michael Gormley, pray that the judgment of the supreme court of Illinois aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

MORTON CULVER,
Attorney for Plaintiffs in Error.

And now comes the said Gertrude Uthe, the said defendant in error, by Henry Booth, her attorney, freely into court, and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid, and she prays that the said supreme court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, etc.

HENRY BOOTH,
Attorney for Defendant in Error.

WILLIAM H. CONDON,
BOOTH & BOOTH,
Of Counsel.

Endorsed on cover: Illinois supreme court. No. 191. Morton Culver and Michael Gormley, plaintiffs in error, *vs.* Gertrude Uthe. Filed October 16, 1886.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1889.

MORTON CULVER AND MICHAEL GORMLEY, *Plaintiffs in Error,* vs. GERTRUDE UTHE, *Defendant in Error.*	191	*Error to the Supreme Court of the State of Illinois.*

Brief for Plaintiffs in Error.

MORTON CULVER.

Attorney for Plaintiffs in Error.

CHICAGO, ILL.

BRADBURY BROS., Law Printers, 78 Fifth Ave.

1889.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1889.

191	MORTON CULVER AND MICHAEL GORMLEY, *Plaintiffs in Error,* vs. GERTRUDE UTHE, *Defendant in Error.*	*Error to the Supreme Court of the State of Illinois.*

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Brief of Plaintiffs in Error.

In a nutshell, this case depends upon the single question of whether or not Christopher F. Uthe acquired a full and complete title in fee to a tract of 160 acres of swamp land (S. E. ¼ Sec. 12, T. 42, N. R. 12, E. of 3rd P. M.) in Cook County, Illinois, by a Patent to him from the United States, dated the 10th day of September, 1851. (*vide* Rec. pp. 38 and 39.)

If under the law and evidence he did acquire such a title thereto, then the judgment of the Supreme Court

of Illinois must stand; but if he did not acquire such a title, then the judgment of the Supreme Court of Illinois must be reversed, and its rulings on the Act of the United States concerning "Swamp Lands" of September 28th, 1850, must be overruled or modified (Rec. p 38.)

Christopher F. Uthe in his lifetime undertook to acquire title to the S. E. ¼ of Sec. 12, T. 42, N. R. 12 E. Cook County, Illinois, by a Patent to him from the United States dated Februrary 10, A. D. 1851. (*vide* Rec. pp. 38 and 39.)

He afterwards died intestate, leaving three children, his only heirs at law, Frederick, Mary Ann (Martin) and Gertrude.

Frederick afterwards died testate, leaving Gertrude his sole devisee and legatee, and still later the said Gertrude and her sister Mary Ann (Martin) representing themselves to be the owners in fee of said 160 acres, proposed to sell the same to the plaintiffsin error Culver and Gormley. Gertrude claimed to be the owner of an undivided two-thirds thereof and Mary Ann of the remaining one-third, and they agreed upon a division between themselves, Mary Ann taking the N. E. ¼ of the 160 for her share and Gertrude the remaining three forties for her share. Mary Ann proposed to sell her 40 acres for $2133.33 and Gertrude her three forties for $4,266.67, in all $6,400. This was agreed to, but for sake of convenience and simplicity Mary Ann and Gertrude instead of first making a partition between themselves in writing, and then conveying their separate interests individually, made a joint deed, with full covenants of warranty, of said lands to Culver and Gormley, dated March 23rd, A. D. 1874. (Rec. p. 35.) Mary Ann received $500 cash and took back a mortgage on *her* share ac-

cording to the partition so made as aforesaid between her and her sister Gertrude, on to-wit, the N. E. ¼ of said 160 acres, to secure the balance of *her* unpaid purchase money.

Gertrude received no money at all, but took back three several mortgages, one on the S. E. ¼ of the 160 acres to secure a principal note of $1,400 due in four years at eight per cent. annually, a second on the S. W. ¼ of said 160 acres, to secure a similar note for the principal sum of $1,400, and a third on the N. W. ¼ of said 160 acres, to secure a similar note for the sum of $1,466.67, being in all $4,266.67, the full amount of unpaid purchase money, and all of said notes and mortgages were given to her to secure payment of unpaid purchase money.

Each principal note had four interest notes attached, representing the annual installments of interest on their respective notes, and each mortgage expressly stated that it was given to secure unpaid purchase money of the property therein described.

Four of these interest notes were fully paid by Culver and Gormley, and also part ($58.93) of a fifth interest coupon, and this suit was brought at law by Gertrude Uthe against Culver and Gormley to recover on the three principal notes and on the remaining eight coupon notes.

This whole tract of 160 acres, except about four or five acres in the northeast corner thereof, is and always has been swamp land, overflowed, and made thereby unfit for cultivation.

As this case has been tried twice in the Circuit Court of Cook County, Illinois, has twice been passed upon by the Appellate Court of the First District of Illinois,

Gormley v. *Uthe*, 1 Brad. 170, *Culver* v. *Uthe*, 7 Brad. 468, and then decided by the Supreme Court of Illinois, *Culver et al.* v. *Uthe*, 116 Ill. 643, the record thereof necessarily contains much matter of no importance in this court, and to simplify matters here it may be well to point out the pleadings and evidence which this court will need only to consider in arriving at a conclusion.

DECLARATION.

Gertrude Uthe filed in the Circuit Court of Cook County, Illinois, on the second day of August, 1878, her declaration in assumpsit, containing one special count on the three principal and eight interest notes and the usual common counts, and appended thereto copies of said notes. (Rec. pp. 4, 5, 6, 7, 8 and 9.)

CULVER'S PLEAS.

To this Morton Culver pleaded:

First. General Issue. (Rec. p. 14.)

Second. Special plea, failure of consideration, alleging that said notes were given to secure purchase money for her share of 160 acres conveyed by her and Mary Ann Martin to Culver and Gormley, that grantors had no title to said land, and offer to re-convey by quit claim deed. (Rec. p. 15.)

Third. Special plea of set off asking to recover back the moneys paid for the four interest coupons and part of a fifth coupon. (Rec. p. 15.)

REPLICATIONS TO CULVER'S PLEAS.

Gertrude Uthe then replied as follows:

To Culver's *first plea*, a similiter. (Rec. p. 21).

To Culver's *second plea*, that title so conveyed was good, denying failure of consideration and that she ought not to be barred in her action. (Rec. pp. 21 and 22).

To Culver's *third plea*, general issue or denial. (Rec. p. 22).

GORMLEY'S PLEAS.

To Gertrude Uthe's declaration Gormley pleaded

First. General issue. (Rec. p. 10.)

Second. Special plea, failure of consideration, alleging that said notes were given to secure purchase for land conveyed by her and her sister to him and Culver, and that neither she nor her sister ever had any title to said lands or any part thereof, and offer to reconvey by quit claim deed. (Rec. pp. 11 and 12).

Third. Notice of set off under statute, demanding judgment against Gertrude Uthe for the moneys already paid for the four interest coupons and part of a fifth coupon. (Rec. p. 12).

REPLICATIONS TO GORMLEY'S PLEAS.

Gertrude Uthe then replied as follows:

To Gormley's *first plea*, a similiter. (Rec. p. 13.)

To Gormley's *second plea*, denying failure of consideration, alleging title good and she ought not to be barred. (Rec. pp. 20 and 21).

To Gormley's third plea, nothing, (not being required by laws of Illinois.)

TRIAL.

On the trial of this cause the second time in the Circuit Court, evidence was offered as follows:

PLAINTIFF'S EVIDENCE.

Plaintiff offered in evidence the 11 notes sued on. (Rec. pp. 25, 26 and 27) and rested.

DEFENDANT'S EVIDENCE.

Defendant proved by evidence of Morton Culver (Rec. p. 28, *et seq.*) that Mary Ann Martin and Gertrude Uthe claimed to own the 160 acres, that the sisters divided the land between themselves, Mary Ann taking the N. E. 40 acres and Gertrude the remaining 120 acres, that Gertrude took back three mortgages on her share(Rec.pp. 28, 34,) that the notes sued on and secured by the three mortgages were given for purchase money of the 120 acres (Rec. p. 34.) and warranty deed was given for same (Rec. pp. 35, 37) and that the land was swamp and overflowed land made unfit thereby for cultivation, (Rec. p. 38) offered in evidence patent for said 160 acres to Christopher F. Uthe from the United States, dated 10th February, 1851, (Rec. pp. 38 and 39,) and also the four coupons paid by Culver and Gormley (Rec. pp. 39, 40,) and part, ($58.93,) paid on a fifth coupon, and tendered a quit claim deed to Gertrude Uthe of said 120 acres, (Rec. pp. 40 and 41.) The tender of this quit-claim deed was objected to and the court denied the tender (Rec. p. 41,) Culver and Gormley then tendered any kind of quit-claim deed that might be asked for.

They also offered in evidence the United States swamp law act of Sept. 28th, 1850, (IX. Statutes at Large, p. 519,) as follows: (Rec. p. 47.)

"SWAMP LANDS.

"Act Sept. 28th, 1850, IX. Statutes at Large, p. "519.

"1. To enable the State of Arkansas to construct "the necessary levees and drains to reclaim the swamp "and overflowed lands therein, the whole of those "swamp and overflowed lands made unfit thereby for "cultivation which shall remain unsold at the passage "of this act shall be and the same are hereby granted "to said state.

"2. It shall be the duty of the Secretary of the In- "terior as soon as may be practicable after the passage "of this act to make out an accurate list and plats of "the lands described as aforesaid and transmit the same "to the Governor of the State of Arkansas and at the "request of said Governor cause a patent to be issued "to the state therefor and on that patent the fee simple "to said lands shall vest in the State of Arkansas, sub- "ject to the disposal of the Legislature thereof; provid- "ed, however, that the proceeds of said lands, whether "from sale or by direct appropriation in kind, shall be "applied exclusively as far as necessary to the purpose "of reclaiming said lands by means of the levees and "drains aforesaid.

"3. In making out a list and plats of the land afore- "said, all legal subdivisions, the greater part of which "is 'wet and unfit for cultivation,' shall be included in "said list and plats; but where the greater part of a sub- "division is not of that character the whole of it shall "be excluded therefrom.

"4. The provisions of this act shall be extended to "and their benefits be conferred upon each of the other "states of the Union in which such swamps and over- "flowed lands known and designated as aforesaid may "be situated."

They also proved by the testimony of Michael Gormley (Rec. pp. 47-51) that the whole of said 160 acres except perhaps 5 acres in the northeast corner thereof was swamp and overflowed land made thereby unfit for cultivation.

PLAINTIFF'S REBUTTAL.

To overcome the evidence of the patent plaintiffs then offered in rebuttal a document, purporting to be from the Department of the Interior as follows (Rec. p. 51):

"M. L. 23554.

"DEPARTMENT OF THE INTERIOR.

"General Land Office,

"WASHINGTON, D. C., OCT. 18TH, 1882.

"I, L. Harrison, Acting Commissioner of the Gen-"eral Land Office, do hereby certify, that the annexed "copy of the application of Christopher F. Uthe, to "locate, M. B. L., warrant No. 37714 for 160 acres, "Act of 1847, is a true and literal exemplification from "the original on file in this office.

"In testimony whereof I have hereunto subscribed "my name and caused the seal of this office to be af-"fixed, at the City of Washington on the day and year "above written.

"[Seal] L. HARRISON,

"Acting Commissioner of

"General Land Office.

"Land Warrant No. 37714

"Register and Receivers No.———

"Land Office, Chicago, Ill., July 10th, 1850.

"We hereby certify that the attached military bounty

"land warrant No. 37714 was on this day received at "this office from Christopher F. Uthe, of Cook County, "State of Illinois.

ALFRED COWLES, Register.
JNO. H. KINZIE, Receiver.

"I, Christopher F. Uthe, of Cook County, State of "Illinois, hereby locate southeast quarter of Section "No. twelve in Township No. forty-two, North of "Range No. twelve east, in the district of lands subject "to sale at the land office at Chicago, containing 160 "acres in satisfaction of the attached warrant numbered "37714.

"Witness my hand this 10th day of July, A. D. 1850.
CHRISTOPHER F. UTHE.

"ALFRED COWLES, Register.

"JNO. H. KINZIE, Receiver.

LAND OFFICE, CHICAGO—1850.

"We hereby certify that the above location is cor- "rect, being in accordance with law and instructions.

"JNO. H. KINZIE, Receiver.
"ALFRED COWLES, Register.

"Land warrant certificate No. 37714.

"I, Christopher F. Uthe, being desirous of locating "the southeast quarter of Section No. twelve, in Town- "ship No. forty-two, north of Range No. twelve, east, "in the district of lands subject to sale at the land office "in Chicago, Illinois, with the attached military land "warrant certificate No. 37714, issued under the pro- "visions of the ninth section of the Act of Congress "approved February 11, 1847, do solemnly swear that "from my knowledge of the fact after actual inspection "of the said tract of land on or about the eighth day of

"July, A. D. 1850, there was not at that time an actual "settlement and cultivation upon any part of said land, "nor was there any person or persons residing upon it.

"And I do verily believe that there is no actual set- "tlement and cultivation or any person or persons re- "siding upon any part of said land at this time."

"CHRISTOPHER F. UTHE.

"Subscribed and sworn to before me this 10th day of "July, 1850.

"ALFRED COWLES,
"Register of Land Office.

"I request my patent to be sent to ——

And to the admission of this document in evidence Culver and Gormley objected.

Because it was irrelevant, incompetent, immaterial and would not prove a sale.

Because not admissible at common law.

Because there is no proof of signatures.

Because not admissible under the statutes of Illinois which are as follows:

§ 20, Chapter 51, Revised Statutes of Illinois.

"The official certificate of any Register or Receiver "of any Land Office of the United States to any fact or "matter on record in his office shall be received in evi- "dence in any court in this State and shall be compe- "tent to prove the fact so certified * * * and the "signature of such register or receiver may be proved "by a certificate of the Secretary of State under his seal "that such signature is genuine."

And because not admissible under the laws of the United States, which is as follows:

(U. S. Rev. Statutes 1873-4, Title 13, Chapter 4.)

"§ 906. All records and exemplifications of books "which may be kept in any public office of any state or "territory of any country subject to the jurisdiction of "the United States (not appertaining to a court) shall be "proved or admitted in any court * * in any other "state * * * by the attestation of the keeper of "said records or books and the seal of his office annexed "* * together with a certificate of the presiding Justice "of the court of the * * * district in which such "office may be kept."

But the court allowed said document to be admitted in evidence

Plaintiffs also proved a complete chain of title to said lands from such Patent to herself and sister, grantors in the deed to Culver and Gormley, provided of course the patent gave said Christopher F. Uthe a valid title.

And thereupon the court notwithstanding the objections of Culver and Gormley instructed the jury in behalf of Gertrude Uthe as follows: (Rec. p. 54.)

PLAINTIFF'S INSTRUCTION.

"1 The jury are instructed that the burden of proof "in this case is upon the defendants, to show by their "evidence that the lands in question or the greater part "thereof were on the 28th day of September, 1850, "swamp and overflowed lands made unfit thereby for "cultivation, *and that the said lands at the date afore-"said had not been sold by the United States;* and if the "defendants have failed to prove these facts by the evi-"dence the verdict should be for the plaintiff, and the jury "if from the evidence they so find for the plaintiff should "assess damages in her favor to the amount of the "aggregate of the principal and interest which they shall

"find to be due and unpaid on the notes given in "evidence by the plaintiff."

And the court, though requested by Culver and Gormley, refused to instruct the jury on their behalf, as follows: (Rec. p. 55).

"3. The jury are instructed for the defendants that "the introduction of the Patent is prima facie that no "Patent prior to its date had been issued by the United "States for the land described in that patent. *Refused.*

"4. That if they believe, from the evidence, that the "notes offered in evidence by the plaintiff were given "by the defendants as part purchase of the S. E. ¼ of "Sec. 12, T. 42 N., R. 12 E., as shown by the war- "ranty deed of conveyance therefor, offered in evidence "by the defendants; and if the jury further find that "said lands or the greater part of each of the 40-acre "tracts therein included were, on the 28th day of Sep- "tember, 1850, swamp lands, overflowed and made "thereby unfit for cultivation, then the jury are instructed "that on the 28th day of September, 1850, said lands "became the property of the State of Illinois unless the "United States had made a previous grant thereof, and "the plaintiff cannot recover unless she shows that she, "or Mary Ann Martin, or both of them, acquired title "as grantee or remote grantee through a grant made by "the United States of America prior to said 28th day of "September, 1850, or as grantee or remote grantee by "grant from the State of Illinois subsequent to the 28th "day of September, 1850, and prior to the commence- "ment of this suit, to-wit: the 2nd day of August, "1878. *Refused.*

"5. The jury are instructed on behalf of the defend- "ants that if they believe, from the evidence, that the

"notes offered in evidence by the plaintiff were given by "the defendants in payment to the plaintiff for S. E. ¼ "of Sec. 12, T. 42 N., R. 12 E., or any part thereof, "and for no other consideration," then the plaintiff, to "maintain her action, must show that she, or Mary Ann "Martin, or both of them, the grantors in the deed "offered in evidence by the defendants had, prior to the "commencement of this suit, to-wit: the 2nd day of "August, 1878, a good and perfect title to said 160 acres "of land, or such part thereof so sold, either as grantee "or remote grantee under a grant from the United "States of America prior to the 28th day of September, "1850, or as grantee or remote grantee from the State "of Illinois by grant subsequent to said 28th day of "September, 1850, provided the jury finds, from the "evidence, that said land, or said part thereof, on said "28th day of September, 1850, were swamp lands and "overflowed and made thereby unfit for cultivation. "*Refused. Burden of proof not on plaintiff.*

"6. The jury are further instructed that it is not nec- "essary for the defendants, in order to make out their "defense, to show that they have tendered a re-convey- "ance of the land, the consideration for the notes in "question, if the jury find, under the instructions given "them, that the defendants upon the facts proved are "otherwise entitled to a verdict in their favor." *Refused.*

"7. The jury are instructed that until the patent is duly "issued according to law the government has not *sold* "the land belonging to it, and that an application under "a land warrant for a piece of land is not a *sale* of it "until the patent is issued on that application to the "party applying for it. *Refused. Misleading, as the*

"*evidence tends to show that land was located before* pas-
"sage of Act of 1850."

The jury rendered a verdict for the plaintiff, Gertrude Uthe, the court entered a judgment thereon for $7,039 and costs, which the Appellate Court affirmed (but rendered no opinion thereon) and the Supreme Court of Illinois decided there was no error and that the judgment must stand, and from this final decision of the Supreme Court of Illinois these plaintiffs in error, Culver and Gormley, come into this court to have the cause finally adjudicated and the title to the lands in controversy forever set at rest and settled.

And now after having given a rather extended but, we trust, a clear statement of the case and of the points in controversy, we respectfully submit to this court the points we desire to urge and the authorities which we think bear upon the case.

ARGUMENT.

This court will readily notice that the whole controversy resolves itself simply to two points:

First.—Was the paper purporting to be a location under a military bounty warrant properly admitted in evidence, and if so,

Second.—Did the location of such warrant take the swamp land so located out of the grant to the state of Illinois?

We insist that said pretended location was improperly admitted. A simple inspection of both the United States statute and the Illinois statute will show conclusively that it could be admitted in evidence under either of them. Nor is it a common law.

1 Greenleaf on Evidence, § 483, *et seq.*

Russell v. *Whiteside*, 4 Scam. (Ills.) 7.

In the case of

R. R. Co. v. *Smith*, 9 Wallace, 99,

decided by this court, and followed by the Supreme Court of Illinois in the case of

Keller v *Brickey*, 78 Ills. 133,

it was expressly decided that under the Act of 28 February, 1850, the title to the swamp lands in the several states passed to such states individually on that day; that the Act was a grant in *præsenti*. See also the case of *Matthews* v. *Goodrich*, 1 N. E. Reporter, 175. This court further decided that proof of the fact that certain lands were "swamp lands" might be proven in open court on the trial of a case.

The *older patent* carries the title.

Bruner v. *Manlove*, 1 Scan. (Ill.) 156.

R. R. Co. v. *Smith*, 9 Wallace 99.

A grant in *præsenti* is a patent, and a patent only passes title.

Wilcox v. *Jackson*, 13 Peters 498.

If, then, the State of Illinois first acquired title, then the instructions requested by Culver and Gormley and refused by the court were improperly refused, for each and every one of them are in consonance with the rulings of this court, and the first instruction given by the court in behalf of Gertrude Uthe was erroneous because it attempts to make Culver and Gormley prove a *negative*.

I Greenleaf on Evidence, § § 74, 81.

And if the instruction be proper, certainly the defendants proved the lands to be swamp lands on Sept. 28, 1850.

And this is rendered still more apparent when the court notices it in connection with Instruction No. 3 offered by Culver and Gormley and refused by the court.

The Supreme Court of Illinois has made a very fair *statement* of the case, and they apparently approve of the decisions of this court in

R. R. Co. v. *Smith*, 9 Wallace 99, and in States of *Ill. and Iowa* v. *McFarland*, 110 U. S. 471, and then decide by a *dictum*. They say virtually that in the Act of 1850 the word *sold does not mean sold*.

This court has already defined the meaning of the word *sold* in a very similar case to the one at bar. In the case commonly called the "Five per cent. cases," 110 U. S. 471, this court says:

"Upon full consideration of the question, with the "aid of the able arguments of counsel, the court is of "opinion that lands disposed of by the United States "*in satisfaction of military land warrants* are not *sold*, "within the meaning of the statutes upon which the "petitioners rely.

"A sale, in the ordinary issue of the word, is a trans- "fer of property for a fixed price in money or its equiva- "lent. When property or money is transferred or paid "as a compensation for service, the property or money "may be said to be the price of the service; but it can "hardly be said that the service is the price of the "property or money, or that the property or money is "sold to the person performing the service. Nor can "it be said that the pay of an officer or soldier in the "army or navy is sold to him by the government, in "consideration of a price paid by him.

"Land or money, other than current salary or pay

"granted by the governor to a person entering the mili-
"tary or naval service of the country, has always been
"called a bounty; and while it is by no means a gratuity,
"because the promise to grant it is one of the considera-
"tions for which the soldier or sailor enters the service,
"yet it is clearly distinguishable from salary or pay
"measured by the time of service. For example, it was
"held by Lord Mansfield and the Court of King's Bench,
"1784, though the master of an apprentice was entitled
"by the act of Parliament of 2 & 3 Anne, Ch. 6, § 17, to
"the wages of his apprentice enlisting into the navy, yet
"the apprentice's share of prize money belonged to him-
"self, and not to his master, because it was not wages,
"but the bounty of the Crown: *Carson* v. *Watts*, 3 Doug.,
"350; *Eades* v. *Vandeput*, 4 Doug., 1. Upon like
"ground, it has been held that bounty money paid by
"the United States, or by a state, city or town, upon
"the enlistment of a minor as a soldier, during the
"recent war, belonged to him, and not to his father or
"master; *Ranks* v. *Conant*, 14 Allen, 497; *Kelly* v.
"*Sprout*, 97 Mass , 169. See also *Alexander* v. *Well-*
"*ington*, 2 Russ. and Myl., 35, 56, 64."

So plaintiffs in error claim the decision of the Supreme Court of Illinois should be reversed, that the pretended location was not properly admitted in evidence, that a *location is not a sale*, that the title to the lands in controversy in fact passed to the State of Illinois on the 28th day of September, 1850, that Christopher F. Uthe never acquired title from the United States by virtue of his patent dated February 10, 1851, and consequently no title at all passed to plaintiffs in error.

Respectfully submitted,

MORTON CULVER,

Atty. for Plaintiffs in Error.

Office Supreme Court U. S.
FILED
DEC 18 1889

IN THE

Supreme Court of the United States.

No 191

OCTOBER TERM, A. D. 1889.

MORTON CULVER and
MICHAEL GORMLEY,
Plaintiffs in Error.

vs.

GERTRUDE UTHE,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

H. B. HURD,
Attorney for Defendant.

CHICAGO:
HORNSTEIN BROS., PRINTERS, 170 MADISON STREET.
1889.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

H. B. HURD,
Attorney for Defendant.

The statement of the case by plaintiffs' attorney is correct in the main, or sufficiently so to present the questions to be decided. We make one correction, because truth requires it.

It is not true, as stated in plaintiffs' brief (see p. 6), that "the sisters divided the land between themselves." They held the title as tenants in common, Mary Ann Martin one undivided third and Gertrude Uthe two undivided thirds, and in that condition conveyed to the

plaintiffs by a joint deed. It is true that they took security for the deferred payments by separate mortgages of each forty-acre parcel, but that fact was wholly immaterial. When the plaintiffs undertook to act upon their assumed right to rescind the contract, in order to make such rescission effectual it was incumbent on them to place Gertrude Uthe in *statu quo* by tendering to her a reconveyance of an undivided two-thirds of the entire quarter section. This they did not pretend to do, and could not have done, as appears from the testimony of Culver. (See p. 41 of transcript, near the bottom.) This failure alone was fatal to their defence.

But passing this by, we will meet the question raised upon the construction of the Swamp Land Act squarely, and we are quite willing to submit the case upon the well-considered opinion of Judge Mulkey, of the Supreme Court of Illinois, in delivering the decision of that court. (See pp. 67, 68, 69, Transcript of Record.)

"MICHAEL GORMLEY *et al.*
vs.
GERTRUDE UTHE.

Opinion by Mulkey, J.

Gertrude Uthe, the defendant in error, recovered a judgment in the Circuit Court of Cook county against Michael Gormley and Morton Culver, plaintiffs in error, for $7,039. A remittitur of $39 was subsequently entered, reducing the judgment to $7,000, which was affirmed on error by the Appellate Court for the first district. The action below was assumpsit, the plaintiff counting upon eleven promissory notes given by the defendants to the plaintiff for a certain quarter section of land near Chicago, which the plaintiff conveyed to them

with the usual covenants of warranty. To the declaration, which was in the usual form, the defendants plead, 1st, non-assumpsit; 2, total failure of consideration; 3d, set-off.

Issues of fact were joined on these pleas and tried before the court and a jury, with the result stated. The lower courts, to reach the conclusion they did, must have found that the defendant made the notes, as charged in the declaration; that there was no failure of the consideration "for which they were given, and also that the plaintiff was not indebted to the defendants by way of set-off. So far, therefore, as the case depends upon these findings of the lower courts, plaintiffs in error clearly can have no relief here. The controlling question in the trial court was whether the title to the land in question was in the defendant at the time of her conveyance to plaintiffs in error.

The plaintiff on the trial made out a *prima facie* case by putting in evidence the eleven notes sued on, and thereupon rested. The defendants then proved the notes were given to secure the purchase-money for the quarter section of land in question, and that contemporaneously with their execution, and as a part of the same transaction, the plaintiff conveyed the land to the defendants by general warranty deed. It was further shown that said land is swamp land, and was so on the 28th of September, 1850, when the act of Congress granted the unsold swamp and overflowed lands to the State. The act itself was also put in evidence, together with an exemplified copy of the patent from the United States for the land, issued on the 10th February, 1851, to Christopher F. Uthe, the father of the plaintiff, and through whom she derives title.

The defendants then rested.

Upon this showing, grant to the State being anterior

to the issuing of the patent, the title to the land appeared to be in the State. To meet the *prima facie* defense thus made, the plaintiff then proved, by an exemplified copy of so much of the records of the Land Office as relates to the location of military bounty land warrant No. 37714, that the same was on the 10th day of July, 1850, duly located by the said Christopher F. Uthe on said quarter section of land, in pursuance of which the patent of the 10th of February, 1851, was issued to him as above shown.

This being all the evidence, the court, on the trial, refused to instruct the jury, at the instance of the defendants, that if they found the facts as above set forth the law was with the defendants, and that they should find accordingly. The ruling of the court in this respect presents the only question necessary to be considered. As the grant by Congress extends to all swamp and overflowed lands in the State remaining "unsold" at the time of the passage of the act, it is contended by plaintiffs in error that, notwithstanding the location of the warrant by Uthe upon the land, the title thereto nevertheless passed to the State under the grant, and that therefore Uthe took nothing by his patent. This contention is founded upon the technical doctrine that where land or other property is bargained and disposed of for a consideration other than money the transaction in contemplation of law is not a sale, but a mere barter or exchange. This we concede to be the general doctrine on the subject. But it does not necessarily follow that in construing the word "sale" or "sold" where it occurs in a statute that it may not be used in a different sense or have a more extended meaning. In giving a construction to words in a statute many things are to be kept in veiw, such as the object or purposes of the act, the connection in which they are used, and the consequences that will probably

result from the proposed construction. Influenced by these considerations, the same word may mean one thing in one statute, and a different thing in another. In one enactment the ordinary meaning of a word may be enlarged; in another contracted. In the present case we do not think the word "sold" occurring in the first section of the act in question is used in its strictly technical sense, as claimed, but in a more extended sense of the term, so as to exclude from the operation of the grant all lands which the United States had by any valid agreement already disposed of at the time the act took effect, whether technically a sale or not. The location of the warrant was authorized by law, and when made was a valid act, mutually binding upon the government as well as the party making it.

It is unreasonable to suppose, therefore, that Congress, in making the grant of swamp lands to the State, could have intended, even conceding it had the power to do so, to defeat and abrogate by mere legislative enactment all entries of land by military bounty warrants for which patents had not been issued at the time of the passage of the act. But if counsel for plaintiffs in error is correct in his reasoning, it is not readily perceived how the issuing of a patent would have helped the matter, for the mere issuing of the patent could not have changed the character of the consideration paid for the land, and, according to the technical common-law rule, there can be no sale in any case where the consideration is anything other than money. The case of *The States of Iowa and Illinois, petitioners*, v. *McFarland*, 110 U. S., pg. 471 *et seq.*, cited by counsel, we do not regard as in conflict with the view here taken. The court in that case construed the word "sale" as it occurred in the statute then under consideration according to its strict technical signification, and we fully concur in the conclusion reached. The con-